Supreme Court of the United States

OCTOBER TERM, 1968

No. 642

EDWARD BOYKIN, JR., *Petitioner*,

—v.—

ALABAMA, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

Grand Jury No. 40

THE STATE OF ALABAMA

vs.

EDWARD BOYKIN, JR.

INDICTMENT—Filed June 29, 1966

THE STATE OF ALABAMA) Circuit Court of Mobile County
MOBILE COUNTY,) June Session, 1966

The GRAND JURY of said County charge, that, before the finding of this indictment Edward Boykin, Jr., whose name is to the Grand Jury otherwise unknown than as stated, feloniously took three hundred seventy three dollars in lawful currency and coin of the United States of America consisting of one dollar bills, five dollar bills and ten dollar bills, five cent pieces, ten cent pieces, twenty five cent pieces and fifty cent pieces, a more particular description of which is to the Grand Jury otherwise unknown than as stated, the property of Annette Fawcett, from her person and against her will, by; violence to her person or by putting her in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama.

CARL M. BOOTH,
District Attorney for the 13th
Judicial Circuit of Alabama
(County of Mobile)

No Prosecutor

A True Bill

OSCAR H. LIPSCOMB.
Foreman of the Grand Jury.

Bail fixed in open court at $2500.00 this the 29th day of June 1966

WILL G. CAFFEY, JR.
Judge.

Presented to the Court by the Foreman of the Grand Jury in the presence of 16 other Grand Jurors
Filed in open court this the 29th day of June 1966.

JOHN E. MANDEVILLE
Clerk, Circuit Court,
Mobile County, Alabama.

ORDER APPOINTING ATTORNEY—July 11th, 1966

State of Alabama	)	Robbery—
Caffey -vs- 15520	)	Robbery—
15521	)	Robbery—
15522	)	Robbery—
15523	)	Robbery—
15526	)	
Edward Boykin, Jr.)		
(Col. Male - Age	)	

Defendant being present in court without Counsel, the undersigned Judge, before arraigning defendant proceeds to ascertain, by examination of defendant, the following questions, viz:—

1.—Have you employed and Attorney (Lawyer) or have you made arrangements to be represented assisted and defended by Counsel in this case?

ANSWER—No.

2.—Are you financially able to obtain an Attorney (Lawyer) to represent, assist and defend you in this case?

Answer—No.

3.—Do you desire the Court to appoint an Attorney (Lawyer) to represent, assist and defend you in this case?

ANSWER—No—But Court deems attorney necessary.

It appearing to the satisfaction of the Court that defendant in these cases is Indigent and desires Legal Counsel, it is therefore ordered and adjudged by the Court that Evan Austill, Attorney at Law, be and is hereby appointed as Counsel to represent, assist and defend said Defendant in these cases.

It is further ordered and adjudged by the court that these cases be and the same is hereby re-set for July 14th, 1966, for arraignment.

Thereupon in open court on this day the defendant was served a copy of the indictment.

ARRAIGNMENT—PLEA GUILTY—REMANDED FOR SENTENCE, ATTORNEY IN COURT—July 14th, 1966

State of Alabama)	Robbery—
McCall -vs- 15520)	Robbery—
15521)	Robbery—
15522)	Robbery—
15523)	Robbery—
15526)	Defendant arraigned and plead guilty—
Edward Boykin, Jr.)	Defendant remanded to Mobile County Jail
(Col. Male - Age))	for sentence on September 14th, 1966—
)	Defendant's Attorney, Evan Austill, in
)	court.

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of Robbery and plead guilty.

It is therefore ordered and adjudged by the court that the defendant be remanded to the Mobile County Jail for sentence on September 14th, 1966.

Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court.

VERDICT, JUDGMENT, SENTENCE. ATTORNEY IN COURT—September 20th, 1966

State of Alabama)	Robbery—
Gaillard -vs- 15520)	Jury and Verdict of, Guilty and Jury fixed
Edward Boykin, Jr.)	punishment at Death by Electrocution—Ad-
(Col. Male - Age))	judged guilty—Sentenced to Death by Elec-
Rec. Court No. 8416)	trocution—Defendant's Attorney, Evan Au-
B.D. 5/25/41)	still, in court.

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day having heretofore on

the 14th day of July, 1966, been arraigned on the indictment in this case charging him with the offense of Robbery and plead guilty and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant came a jury of good and lawful men, to-wit:—E. J. Strong, Jr. Foreman, and eleven others, who, having been duly empaneled and sworn according to law, who, having heard the evidence and the charge of the court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant, do say: "We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution."

Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied, "he had not;" It is therefore considered and adjudged by the court that the defendant is guilty of the offense of Robbery as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the Defendant suffer death by electrocution.

Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court.

ORDER—SENTENCE SET ASIDE—REMANDED FOR SENTENCE —September 20th, 1966

State of Alabama)	Robbery—
Gaillard -vs- 15520)	Sentence of the 20th day of September,
Edward Boykin, Jr.)	1966, set aside—Defendant remanded for
(Col. Male - Age))	proper sentencing on September 21st, 1966.
Rec. Court No. 8416)	
B.D. 5/25/41)	

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper

person and with his attorney, Evan Austill; It is ordered and adjudged by the court that the sentence against the defendant in this case as of the 20th day of September, 1966, be and the same is hereby set aside.

It is further ordered and adjudged by the court that the defendant be remanded to the Mobile County Jail for proper sentencing in this case on September 21st, 1966.

JUDGMENT, SENTENCE—NOTICE OF APPEAL—SENTENCE SUSPENDED PENDING APPEAL—September 21st, 1966

State of Alabama)	Robbery—
Gaillard -vs- 15520)	Jury and Verdict of Guilty of Robbery and
Edward Boykin, Jr.)	Jury fixed Punishment At Death By Elec-
(Col. Male - Age))	trocution—Adjudged guilty of Robbery—
Rec. Court No. 8416)	Sentenced to Death by Electrocution on
B.D. 5/25/41)	December 16, 1966—Notice of Appeal—
)	Execution of sentence suspended pending
)	Appeal—Defendant ordered transported to
)	Kilby Prison at Montgomery, Alabama,
)	pending appeal.

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day having heretofore on the 14th day of July, 1966, been arraigned on the indictment in this case charging him with the offense of Robbery and plead guilty and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant came a Jury of good and lawful men, to-wit:—E. J. Strong, Jr., Foreman, and eleven others, who, having been duly empaneled and sworn according to law, who, having heard the evidence and the charge of the court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's Attorney and defendant do say, "We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution."

In open court on this day in the presence of the District Attorney, and Defendant's Attorney, Evan Austill, the Defendant Edward Boykin, Jr., being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied, "he had not;" It is, therefore, considered and adjudged by the Court that you, Edward Boykin, Jr., are guilty of the offense of Robbery as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of you, Edward Boykin, Jr., the costs of this prosecution and that you, Edward Boykin, Jr., suffer death by electrocution at any time before the hour of sunrise on the 16th day of December, 1966, inside the walls of Kilby Prison at Montgomery, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is, therefore, ordered and adjudged by the Court that the Warden of Kilby Prison at Montgomery, Alabama, or in case of his death, disability, or absence his deputy shall at any time before the hour of sunrise on the 16th day of December, 1966, inside the walls of Kilby Prison at Montgomery in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Edward Boykin, Jr., a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Edward Boykin, Jr. until the said Edward Boykin, Jr. be dead.

And it is further ordered and adjudged by the Court that the Clerk of this Court shall within ten days from this day, the 21st day of September, 1966, issue a warrant under the seal of this court for the execution of the sentence in this case which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for the execution of the sentence in this case, directed to the Warden of Kilby Prison at Montgomery commanding him to proceed at the time and place named in the sentence to carry the same into execution, by causing to pass through the body of the said Edward Boykin, Jr., a current of electricity of sufficient intensity to cause death and the application and continu-

ance of such current through the body of the said Edward Boykin, Jr., until said Edward Boykin, Jr. is dead and the Clerk of this Court shall deliver such warrant to the Sheriff of Mobile County, Alabama, to be by said Sheriff delivered to the said Warden together with the said Edward Boykin, Jr.

AND it is further ordered and adjudged by the Court that immediately upon receipt of said warrant the Sheriff shall transport said Edward Boykin, Jr., to Kilby Prison at Montgomery and shall there deliver said Edward Boykin, Jr., and the warrant aforesaid into the hands of the Warden and shall take from the said Warden his receipt for said Edward Boykin, Jr. and said warrant, which said receipt the Sheriff shall return to the office of this court.

AND thereupon in open court on this day at the time of the sentence the defendant gave notice of appeal and moved the court to suspend execution of sentence pending appeal. It is, therefore, ordered and adjudged by the Court that execution of the sentence in this case be and the same is hereby suspended pending appeal.

AND it is further ordered and adjudged by the Court that the Sheriff of Mobile County, Alabama, be and he is hereby ordered to immediately transport the said Edward Boykin, Jr., to Kilby Prison at Montgomery, Alabama, there to be held pending appeal in this case.

DATED at Mobile, Alabama, this the 21st day of September, 1966. Walter F. Gaillard, Judge.

ORDER, COURT REPORTER TO PREPARE AND FILE TRANSCRIPT OF TESTIMONY—October 28th, 1966

State of Alabama) Robbery—
Gaillard -vs- 15520) Order Appointing Court Reporter to Tran-
Edward Boykin, Jr.) scribe Testimony and Proceedings, to be
(Col. Male - Age)) paid by the State.

This day in open court came the State of Alabama by its District Attorney and thereupon in open court on this day; It is ordered and adjudged by the court that Mrs. Madelyn Bryars, Official Court Reporter be and she is hereby ordered to transcribe testimony and proceedings had at the trial of this case and to file Transcript of Testimony and Proceedings with the Clerk of the Circuit Court of Mobile County, Alabama, to be paid by the State.

IN THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF ALABAMA,
MOBILE, COUNTY

Criminal Division # 15520

STATE OF ALABAMA

vs

EDWARD BOYKIN, JR., DEFENDANT

BE IT REMEMBERED: That heretofore on to-wit, the 20th day of September, 1966, being one of the judicial days of the said court, this cause came on for trial before the Honorable Walter F. Gaillard, sitting as Judge of the said Court, and a Jury, whereupon the following testimony was offered and proceedings had, in due form of law:

* * * *

APPEARANCES

For the State of Alabama:

Hon. Sidney Pfleger, Assistant District Attorney, Mobile, Alabama

For the Defendant:

Hon. Evan Austill, Van Antwerp Building, Mobile, Alabama.

[fol. 3] MR. PFLEGER: I would like for the record to show, if I am correct that there are twelve of the panel of jurors seated in the jury box. I would like the court to ask the defendant whether or not he is satisfied with those twelve men and if he wishes to have all of these cases heard before the same jury.

THE COURT: Are you satisfied with these twelve gentlemen?

EDWARD BOYKIN: Yes.

THE COURT: Do you wish all five cases to be heard before the same jury?

EDWARD BOYKIN: Yes.

THE COURT: Does that meet with your approval?

MR. AUSTILL: Yes, sir. I have already talked with him about it.

MR. PFLEGER: If you will qualify them we will proceed.

Whereupon the jury was qualified and there being no objections or exceptions to the qualification by the court the same is omitted from this transcript.

James V. Loper, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, sir?

A James V. Loper.

Q What is your business or occupation, Mr. Loper?

A Manager, grocery.

Q And what is the name of the grocery, sir?

A Pak-A-Sak.

Q And where is the store that you are manager located at, sir?

A 763 Summerville Street.

Q Is that in the City and County of Mobile, State of Alabama?

A Yes, sir.

Q Were you acting as such manager back on the night of May the 8th, 1966?

A Yes, sir.

Q On the night of May 8th, 1966 at about eleven P.M. did anything unusual happen in your grocery store?

[fol. 4] A Yes, sir.

Q What happened, please, sir?

A This particular defendant here entered with a gun. He didn't have a gun in his hand when he entered . . .

Q Now you say this particular defendant, are you speaking of the boy sitting over here . . .

A This boy right here. (Indicating)

Q . . at the defense table?

A Yes, sir. And asked for some matches and I handed them to him and in the meantime he pulled his gun out, see.

Q And af[illegible]he pulled his gun out what did he say and do, sir?

A Well, he had me to lay down and another boy got the money out of the register while he was doing the gun around.

Q This particular individual was waving the gun around making you lie on the floor while the other man took the money from the cash register?

A Yes, sir.

Q Was that money in the cash register under your control and your supervision and possession?

A Sir?

Q Was that money under your possession and . .

A Yes, sir.

Q . . or your property there insofar as the store was concerned?

A I was in charge.

Q You were in charge. Now how much money did they take, sir?

A $260 or $262. I don't remember just what.

Q $262. And what did it consist of, if you will, sir?

A Ones, fives, nickels, dimes, quarters, halves, maybe a few tens.

Q Was that lawful currency of the United States Government?

A Yes, sir.

Q Did you—did he take this money against your will?

A Yes, sir.

Q Did he threaten you in any way, other than . .

A Well, he had this gun and he had us to lay down on the floor while they got the money.

Q All right, sir. Mr. Loper, after he took the money what happened then, sir?

[fol. 5] A Well, after he got the money he turned and goes out the door and shoots back to see that we don't [illegible]et up and follow him, I guess.

Q Shot back in the store?

A Through the door.

Q Through the door. Were there other people in the store at the time?

A Yes, sir.

Q Did the—could you tell where the bullet went that came in the store?

A Yes, sir. It entered the door and went up in the ceiling and come back down and went over mine and another boy's head and then fell on the floor and one of the officers picked it up.

Q Now, who was the other boy, sir?

A Harmon Weaver.

Q Are you positive that this is the man. . .

A I know it was.

Q . . that had the gun, and the other man that was with him took the money?

A That's right.

Q They left together?

A They left together.

Q Who opened the cash register, Mr. Loper?

A Harmon Weaver, this boy that was working with me. The boy that he told to get the money out didn't know how to open it, so he made him get it out before he lay down.

Q Did he point the pistol toward you and make him open the cash register before he lay down?

A Yes, sir.

Q Did he make any threats as to what he would do to you?

A Well, Harmon kind of hesitated laying down and he used some mighty ugly words, meaning hustle, you know. Called him a name and told him to get down.

Q Did he tell him what he would do if he didn't get down?

A He just told him to get down you so and so.

MR. PLFEGER: No further questions of Mr. Loper.

MR. AUSTILL: We have no questions, Your Honor.

[fol. 6] Harmon Alton Weaver, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, sir?
A Harmon Alton Weaver.
Q And where were you employed back on May 8th, 1966?
A Pak-A-Sak number 9, 763 Summerville Street.
Q Is that where Mr. Loper was the manager?
A Yes, sir.
Q About eleven o'clock on that night did something unusual happen there?
A Yes, sir.
Q What happened, if you can tell us, Mr. Weaver?
A Well, the defendant, he came in and asked for some matches and while Mr. Loper was getting him the matches he pulled out his gun and demanded the money.
Q Now, you say the defendant, are you referring to the man seated over here with the white shirt on and green trousers?
A Yes, sir.
Q And he is the man that had the gun?
A Yes, sir.
Q What did he do with the gun, sir?
A Well, he waved it around and told this other boy to come in and get the money out.
Q Who opened the cash register?
A I did.
Q Did you do it voluntarily?
A No, sir.
Q What did he do to make you open the cash register?
A Well, he caught me by the shirt and pointed the gun up and told me to open it.
Q Did he make any threats about your life or anything while he was talking?
A Well, when he told me to open it I didn't hesitate.
Q You didn't hesitate?
A No, sir.
Q I'll ask you again, did he make any threats if you didn't lay down?
[fol. 7] A Yes, he made . . .

Q What threats did he make?
A He called me a few dirty words, and . . .
Q What else did he say?
A Well, that's about all.
Q Now you are positive that is the man at that particular time?
A I am positive.
Q After they took the money out of the cash register what took place?
A Well, after they got the money and started to leave he turned and shot back through the store.
Q Shot back through the store.
MR. PFLEGER: No further questions.

ON CROSS EXAMINATION

By Mr. Austill

Q Your name is Weaver?
A Yes, sir.
Q Mr. Weaver, what did you do after you gave him the money? Did you get back down on the floor again?
A Yes, sir.
Q You and Mr. Loper remained on the floor until after he left?
A Yes, sir.
Q Were you still on the floor at the time that he shot the pistol?
A Yes, sir.
Q The pistol did what—shot in through the door, you say, and hit the ceiling?
A Yes, sir.
Q Was anybody persuing him at the time he fired the pistol?
A No, sir.
Q You were on the floor.
A We were on the floor.
MR. AUSTILL: All right, sir.
MR. PFLEGER: Court please, that will be all the evidence insofar as the Loper case is concerned, case number 15526.

[fol. 8] Annette Fawcett, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please, ma'am?
A Mrs. Annette Fawcett.
Q Mrs. Fawcett, what is your business or occupation?
A I have a drug store.
Q And where is it located, please, ma'am?
A 2011 Springhill Avenue.
Q Is that in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q Mrs. Fawcett, were you operating that store back on May 6, 1966?
A Yes, sir.
Q At about nine o'clock on that evening, or thereabouts, did anything unusual happen in your drug store?
A Yes, sir.
Q What unusual happened, please, ma'am?
A Well, I had a couple of customers come in—we have a little bell and it rings and the door opens—as they went out these two boys went over to the ice cream cabinet and got a half gallon of ice cream and came over to the back counter—you see, we have two registers, one in the front and one in the back—and put the ice cream on the counter. I noticed that he went back to the school supply rack which is over near the ice cream cabinet and when he came back he said—threw a dollar bill on the counter and they were divided, one was by the register and one was by the adding machine.
Q Now, do you see anybody in the courtroom that you are referring to that was there on that occasion relative to the buying of the ice cream?
A No, sir. Mrs. Van Aikin—John B. Waterman's son-in-law came and got a package and went out just as they came in and I don't know who else. Somebody was at the magazine section, but I don't remember who it was.
Q Did you see this man seated over here with the white shirt and green trousers on?

A Yes, sir.

[fol. 9] Q Did he come into your drug store there?

A Yes, sir.

Q Was he one of the two buying ice cream?

A Yes, sir. He had on the green beret.

Q He had on a green beret.

A Yes, sir.

Q Then what did he do, please, ma'am?

A Well, he threw the—put the ice cream on the counter and I think he had previously worked for us. I thought maybe he might be just cutting up, but he said —I said, "Well, I don't think that will be enough because I have to have tax." And he said, "And the book, and the book, and the book." And he put the book up against the wrapping counter which would make it stick up about an inch, you know. I said, "What type book is it?" It was a composition book that has a glazed back, you know, and it was red. I knew we didn't have anything but the twenty five and sixty nine because we were out of the forty nine. "What size is it?" And he kept on saying, "And the book, and the book, and the book." And I leaned over to see what—how wide the book was, if it was a big book or a little book and when I did he reached across and grabbed me here (indicating) and said, "Don't say a word."

Q Grabbed you by your dress?

A Yes, sir, right here (indicating) and said, "Don't say a word." And he put the gun—pulled it out of the book, see. As I looked for the book he pulled the book up and the gun was in the book.

Q Gun was in the book?

A Yes, sir.

Q Was this man seated over here the man that had the gun?

A Yes, sir.

Q Then after he had the gun and pointed the gun at you and told you not to say a thing what did you see then, ma'am?

A I didn't do a thing because the younger boy that was with him came—the register is where there is a entrance to the back of the counter and the adding machine

is where there is an entrance into the back of the counter and the prescription room. Well, he pulled me on back to where the adding machine was and the other boy came on around to the register to open it. He put the gun in my back and he said—and the boy didn't seem to know [fol. 10] much about the register and he punched down something on the register that he couldn't push it, and so he asked me—kept on saying, "Open the register, open it, open it." So I said,—in a few minutes it opened. He kept on pushing it and it did open. Then he said, "Don't say a word," or something like that. Then I said, "Just take it all because," I said, "I carry insurance. Don't worry about that." And then . .

Q Were you frightened at the time?

A Sir?

Q Were you frightened at the time?

A No, sir, I wasn't frightened.

Q You weren't frightened?

A No, sir.

Q But the man had the gun on you?

A Yes, sir.

Q You didn't willingly part with the money, did you, Mrs. Fawcett?

A No, sir.

Q And he took the money as a result of having the gun on you and opening the register?

A Yes, sir. My delivery—you see, our delivery boy had arrived in boots and he had just gone to the wareroom, which is back of the prescription department, to take his boots off and put on his regular shoes. And he heard all this—"And the book, and the book, and the book" was kind of loud and so he came to see what had happened. And as he come out of the wareroom door into the prescription room they saw him and they made him come up behind the cash register with me.

Q You say he took the money. How much money did he take?

A It was about $373., I believe it was.

Q And what was that composed of, Mrs. Fawcett?

A Well, I'll tell you, it was two registers, see. It was nickels, dimes, quarters, halves—now, they left most of

the pennies in my register, the back register, and left a few dimes and they left two checks in the back.

Q Were there any bills?

A Yes, sir, bills.

[fol. 11] Q Ones, fives and tens?

A Yes, sir.

Q Was all that money lawful currency of the United States Government?

A Yes, sir.

Q Now, did they go quietly out of the place, Mrs. Fawcett?

A Well, the thing about it is, as the younger boy went to the front register this boy took us to the back, to the wareroom—on through the prescription room into the wareroom and threw the gun back and forth, because—and I looked to see if the gun was loaded because I carry a gun. I have a permit to carry a gun. I wouldn't want to jurt anybody myself, but anyway, he kept on flashing it and it looked like an unusual gun to me because my gun is entirely different. I kept looking to see if it was loaded and I could see it was loaded. And then he said, "And the keys, and the keys, and the keys; give me the geys, give me the keys." I didn't know what—I thought he was talking to the boy out front about the keys, that was while he was at the front register, and at the back he did the same thing. I realized that he wanted my car keys and so then he decided he would take us with him, take the delivery boy, which is a colored delivery boy, and me with him in my car. And we were going on out and —our store closes at nine and so does Foodtown—and the little girl in front had run next door to get me a loaf of bread and as she walked in the door—I had asked her what time it was. I said, I have no idea. I said, after you got shot I kind of lost consciousness." She said it was exactly nine o'clock when I looked up at the door. Said, "When I walked in and I saw the young boy in the front register I said to him, "What in the dickens are you doing". Said, she got about that far and then she said, "Oh, my God, I'm shot."

Q Now, who fired the pistol?

A He had the pistol.

Q He had the pistol?
A Yes, sir.
Q The pistol was fired. . .
A It was fired from back at the back cash register.
Q And the young girl was shot. Where did she get shot?
A It was in the thigh—in the calf of her leg.
[fol. 12] Q Calf of her leg?
A Yes, sir.
Q Now, that money that was taken, was that your money?
A Yes, sir. We usually carry a lot more money than that. And, of course, the checks that I found I deducted them from it. And I just now found out I've got the checks still with me. People had told me they had never gone through and I couldn't understand that. I thought sure I had deposited them but I think I must have forgot it.
Q All that happened on May 6th about 9'o'clock on Springhill Avenue, in the City and County of Mobile, State of Alabama?
A Yes, sir. I didn't get excited until the girl got shot. I hadn't ever seen anyone shot before. I don't know whether he intended to shoot her or not. I think maybe he intended to shoot just to frighten because the officer said it hit the floor and, you know.
MR. PFLEGER: No further questions.

ON CROSS EXAMINATION

By Mr. Austill

Q Mrs. Fawcett. . .
A Yes, sir.
Q . . where were you now when this lady got shot?
A The lady got shot. I was—he was bringing us out of the wareroom into the prescription room—and the prescription room you go out the door into the front of the store—and the little bell rang and she walked in with a loaf of bread. She hadn't looked back at the back to see anything was going on, she was talking about the front one; she was thinking of the man at the front register,

what he was doing in the register. She said, "What in the dickens—" like that, she said. And all of a sudden she said, "Oh, my God, I'm shot."

Q Now who was bringing you from the back? Was it this boy?

A He was. He was bringing my delivery boy and me both. He was going to take us in my car. See, he wanted the keys.

Q Now, the girl that got shot, was—she was where? She was up at the front of the store?

A Yes, sir. She had come—she had run next door. [fol. 13] See, we close at nine and Foodtown closes at nine and I asked her to run get me a loaf of bread and she had. She just stepped out and stepped back in, you see. It all happened it seemed like to me in five or ten minutes.

Q Did you see her when she got shot?

A Yes, sir, and I have never seen anybody shot before. I was so afraid that it was—I thought it was two shots. I was so afraid it was internal when they brought the ambulance, you know.

Q Which boy shot?

A The boy that had the gun.

Q Did you see him shoot her or you figure he shot her because you saw him have a gun earlier?

A Well, I didn't see him shoot her, but I know he shot because the gun—in the position he was in front of my register—the bullet hit the floor and just glazed the floor, you see. I don't believe that he really intended to kill her but . .

Q In other words the bullet . .

A He knew that he couldn't get out any other way because our back door has got about six or eight locks on it. There would be no way in the world unless you broke a window to go out the back.

Q You say the bullet hit the floor first and then ricocheted. .

A Yes, sir. She still has the bullet in her leg.

Q You didn't see this boy shoot?

A Yes, sir.

MR. AUSTILL: That's all.

ON RE DIRECT EXAMINATION

By Mr. Pfleger.

Q She still has the bullet in her leg?
A In her leg, yes, sir. Doctor Lindsay is her doctor and she went two weeks ago to check on it because he wants it to work out because it is between two small bones in the calf of the leg.
Q Now, this man here seated at the table is the only one you saw with a pistol on that occasion?
A Yes, sir. He's the only one that had the pistol.
MR. PFLEGER: No further questions. You may step down. That is all on the Fawcett case.

[fol. 14] Jerry Smith, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please?
A Jerry Smith.
Q And how old are you Jerry?
A Sixteen.
Q Jerry, did you have a job back in April of this year?
A Yes, sir.
Q Were you working on April 23rd, 1966?
A Yes, sir.
Q And where were you working?
A At the Dairy Castle.
Q Who owns and operates the Dairy Castle?
A Walter Hersh.
Q Mr. Walter Hersh. On that night about eleven forty, did anything unusual happen?
A Yes, sir.
Q What happened that was unusual?
A Well, it was pretty near closing time and I was going to empty the trash. I was going out the back way and this man was squatting. He looked like he was at the door trying to unlock it.
Q The man was at the door trying to unlock it?

A Yes, sir, at the back door as I was going out to empty trash.

Q Do you see that man in the courtroom here today?

A Yes, sir.

Q Where is he, please?

A Sitting over there.

Q Is he the man with the white shirt and green trousers?

A Yes, sir.

Q What did he do then, please?

A Just as soon as I got near the door he opened it and put a gun on my back and said turn around and get to the front.

Q He put a gun on you. Did you see the gun?

A Yes, sir.

Q Then what did he do?

A He said get to the front or I'll shoot, so I walked [fol. 15] to the front.

Q After you walked to the front what happened?

A Well, I looked at our manager and she said—I just looked at her kind of stunned and she said, "Open it", and I opened the cash register and walked back. He started gathering the money then.

Q He said open the cash register and you stepped back. What did he do then?

A No, sir. I went up there and I looked at our manager.

Q Looked at the manager?

A Yes, sir. And she said open it so I opened it. I backed off and he started getting the money.

Q Where was the gun at that point?

A Well, when he came in he saw her and kind of waved it over at her.

Q That's when she told you to open the cash register?

A Yes, sir.

Q And when you opened the cash register did he take the money?

A Yes, sir.

Q Do you know how much money was taken?

A Approximately three ten—two ten.

Q Now, did Mr. Hersh come over there right afterwards?
A Yes, sir, after he left.
Q Now, that money that was taken, what did that consist of?
A Well, he took all of the small change. Took every bit of the change out of the register.
Q Was that made up of nickels, dimes, quarters and half dollars?
A Yes, sir.
Q And was the balance made up of one dollar bills, fives, tens and twenty dollar bills?
A Yes, sir.
Q And was all that lawful currency of the United States Government?
A Yes, sir.
Q Now, did you give it to him or did he take it against your will?
A No, sir, he took it.
Q He took it. At pistol point?
A Yes, sir.
Q Now, that place of business, where is it located?
A 1614 St. Stephens Road.
[fol. 16] Q Is that here in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q And this was about what time at night?
A About a quarter to 12.
Q About a quarter to 12. No further questions.
MR. AUSTILL: No questions.

Walter Hersh, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q You Mr. Walter Hersh?
A Yes, sir.
Q Do you own the Dairy Castle located at 1614 St. Stephens Road?
A I do.

Q Were you at the place on the night of April 23rd, 1966?

A I wasn't inside. I live behind it.

Q At about 11:45 that night did you have any occasion to go over to your place of business?

A I did not. They called me after the robbery.

Q They called you?

A Yes, sir.

Q Did you check up to find out how much money was taken?

A Yes, sir.

Q How much money was taken?

A Approximately two hundred and nine dollars.

Q How was that made up?

A Small change—different change and dollar bills, fives, tens and twenties.

Q All that lawful currency of the United States Government?

A Yes, sir.

Q And that was your money that was under the custody of the manager and Jerry Smith . . .

A That's right.

Q . . . running the place?

A Yes.

MR. PFLEGER: No further questions.

[fol. 17] MR. AUSTILL: No questions.

MR. PFLEGER: We have no further evidence, Court please, in the—that particular indictment.

John E. G. Campbell, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name, please?

A John E. G. Campbell.

Q What is your business or occupation, Mr. Campbell?

A I operate a business which is a combination service station, garage, grocery store and general merchandising all combined in one.

Q Where is it located?

A 1714 Virginia Street, one block east of Houston.

Q Is that here in the City and County of Mobile, State of Alabama?

A Yes, sir, it is.

Q Were you operating that place of business on May 5, 1966, Mr. Campbell?

A Yes, sir.

Q Mr. Campbell, about eight or 8:30 somewhere along in there, did anything unusual happen at your filling station?

A Yes, sir, Mr. Pfleger, it did.

Q What took place at that time and place?

A This young man over here and an accomplice came into my place of business and held me up.

Q You say this young man over here, you mean the man with the white shirt on and green trousers?

A Yes, sir.

Q Edward Boykin?

A Edward Boykin.

A Just what did he do, please?

A Well, I noticed the two of them coming in. My daughter and myself were in the store. I didn't notice the shape of the bag he had in his hand at the time. The two walked in the front door and around toward the back of the store. I noticed his accomplice was looking at the meat box I have in the back and I said, "Do you want some meat back there?" And he said, "Yes, sir, I want some [fol. 18] boloney." I said, "Well, I keep all my meat up here in the front in my dairy case, that box doesn't work." So his accomplice came on up and was looking in the dairy case at the packaged lunch meats and I noticed him coming on down the aisle about as far as from here to that table away from me where I was standing at the check out counter with my daughter. At that time I noticed that the bag in his hand was in the shape of a gun, and I knew what was coming off. I just stepped out from behind the counter to keep him from putting the gun on my daughter and myself and walked up to him and said, "Son what have you got in that bag?"—knowing all the time what he had. By the time I reached him he had the gun

out of the bag and with his left hand he grabbed my right wrist here (indicating) and threw the gun in my face.

Q Threw the gun in your face. That's the man that is seated here?

A That's exactly him.

Q After he threw the gun in your face, what did he do then, please?

A He said, "This is a stick-up."

Q All right, sir.

A "I want your money."

Q What else?

A I told him—I said, "Son, you are going the wrong road." I said, "You can't get nowhere like that, it's the wrong thing to do and you just can't profit by it." He said, "I want your money and don't want nothing else." And he kept on cursing me, calling me—I better not repeat it. At one time he made the remark, "I ought to kill you right now." I just continued talking to him all the time and he had his accomplice to go to the cash register and open the cash register and take the money out of the register.

Q How much money did they take from the register?

A Took approximately a hundred and forty five dollars.

Q And how was that made up, please, sir?

A It consisted of quarters, ones, fives, tens and possibly a couple of twenties. They did not touch the nickels, dimes and pennies.

Q Now, did they take that money out of your cash register against your will?

A Sure did.

Q And at that time you say the accomplice was taking [fol. 19] the money out he still had the pistol pointed at you?

A He still held me by the wrist—he held me by my right wrist all the time with his left hand and his gun in my face with his right hand. All the time.

Q After he took the money, what did they do then, please, sir?

A He told me—said, "Give me the keys to that car out there." I had a brand new car outside which belonged to

Grady Buick Company while they were servicing mine. So with my left hand I reached in my pocket and give him the keys to this car of Grady Buick's. So his accomplice took the keys and had the money and was going on out the door and he was still holding me by the hand at the same time going out the door.

Q He was taking you out the door, had the gun on you . . .

A Yes, sir.

Q . . . and had taken the keys to the automobile under your control that belonged to Grady Buick?

A That belonged to Grady Buick Company. His accomplice had the keys and the money and was proceeding on out the door first. He made the remark to my daughter—says, "Honey, don't call the police until your daddy gets back. We are going to take him around the corner, drive a couple of blocks and let him out." Said, "Don't call the police until your daddy gets back." My daughter was petrified. Just as—between the time his accomplice got out the front door and before we could get to it, an automobile drove up to the front door and stopped right at the door no further than from here to there (indicating) with four young white men in it. When he saw them he took the gun off of me and put it down by his side but continued holding my right wrist with his left hand. And with his gun down by his side like that and holding my arm he told his accomplice—said, "Come on, man, get in the car." Well, his accomplice had the money and the keys and he was only interested in getting away. He proceeded on around the side of the building, down the Weinacker Avenue side. Finally he had gone about sixty or seventy feet and he had took me about half that far, calling his accomplice all the time to come back and get in the car, which his accomplice—he wouldn't say a word, just kept going. At that time I reckon he knew that his accomplice was not going to come back and get in the car [fol. 20] so he turned my arm loose. At that time I just turned around and come on back into the station and called the police. The two of them was running down Weinacker Avenue. They ran on down Weinacker Avenue toward Government Street and from testimony that was given me by my neighbors. . .

Q You can't tell what somebody else. . .
A They went on down Weinacker Avenue toward Government Street.
Q Are you positive that this was the man that had the gun on you and had the other man take the money out of your cash register?
A Yes, sir, I sure am.
Q He's the man that told your little daughter not to call the police?
A Yes.
Q And they had you and let you go later?
A Yes, sir.
Q And he was the man that was pulling you out the door with a gun in your face, pulling you by your left arm. All that took place here in the City and County of Mobile, State of Alabama?
A Yes, sir.
MR. PFLEGER: No further questions.
MR. AUSTILL: No questions.
MR. PFLEGER: That's all we have to offer on Mr. Campbell, if the court please.

Sylvester Pugh, being first duly and legally sworn, testified to the following:

ON DIRECT EXAMINATION

By Mr. Pfleger

Q What is your name?
A Sylvester Pugh.
Q What is your business or occupation?
A Service station operator.
Q And where is that service station located, Mr. Pugh?
A 1360 Springhill Avenue.
Q Is that in the City and County of Mobile, State of Alabama?
A Yes, sir.
Q Were you operating that station, Mr. Pugh, back on May 3rd, 1966?
[fol. 21] A Yes, sir.

Q At about nine o'clock or thereabout on that date did anything unusual happen in your filling station?

A Yes, sir.

Q What unusual thing happened, please, sir?

A Well, at nine o'clock it's closing time and I was checking the register, checking out to close up and two fellows walked into the door and said, "Give me change for a dollar." I was standing there counting my dimes and I said, "Just a minute. When I get these counted I will give it to you." I turned back and started counting my dimes and when I did he said, "That's all right, I'll just take it all." I turned around and he had a 45 in my face.

Q Do you see that fellow in the courtroom?

A Yes, sir.

Q Where is he, please?

A Sitting right over there.

Q Man in the white shirt with green pants, named Edward Boykin?

A That's right.

Q And you say had a .45 in your face?

A Yes, sir.

Q What did he tell you he would do with the .45, if anything?

A When he said I'll take it all and I turned around and he had that .45 in my face he said, "If you try anything I'll blow your brains out."

Q And what did you do then relative to your money?

A Well, he said, "Hand it to me." So I just taken my left hand and handed it to him, like that.

Q Still holding the .45 on you?

A We dropped some of it on the floor and he picked that up too.

Q And how much money did he take, sir?

A A hundred fifty eight dollars and twenty eight cents.

Q And how was that made up, sir?

A Pennies, nickels, dimes, quarters, halves, ones, fives, tens and twenties.

Q Was all that lawful currency of the United States Government?

A Yes, sir.

Q That was your money?

[fol. 22] A Yes, sir.

Q Did you stay there at the place there then, Mr. Pugh?

A No, sir. After he got my money he said, "Come on, go with me." I said, "Man, I can't leave this station." He said, "Come on, do what I say."

Q Did he still have the gun on you?

A Yes, sir.

Q And then what did you do then?

A He said, "Just come on down the road with me a little piece." Then he kind of pulled that gun back a little and I said, "Boy, don't hit me with that gun." He said, "I ain't going to hit you with it, but come on go with me." Said, "It won't be nothing to it, but I just want you to go a little piece with me." So he walked me a half a block away from the station.

Q He walked you a half a block away from the station. And then did he go one way and you another?

A Yes, sir. When we got about half a block away he said you can go back now and I went back.

Q Did you willingly part with your money?

A No, sir.

Q He took it at the point of a pistol, .45 caliber pistol?

A That's right.

MR. PFLEGER: No further questions.

MR. AUSTILL: No questions.

MR. PFLEGER: Judge, I think the State will rest. I think we have sufficient evidence on each one of the cases to support the indictments. Does the defense have any evidence?

MR. AUSTILL: No.

THE COURT: He is free to put on any evidence.

MR. AUSTILL: Yes, sir. He has none.

(Whereupon the attorneys proceeded to make their final summation to the jury.)

ORAL CHARGE TO THE JURY

THE COURT: Some of you gentlemen were on the [fol. 23] jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict. Do you have any exceptions as to what the court has said?

MR. AUSTILL: No, sir.

MR. PFLEGER: None for the State.

JUROR: We have five cases. These sentences will not run concurrently, will they?

THE COURT: They will not run concurrent unless the jury requests it.

VERDICT

THE COURT: Gentlemen, have you arrived at your verdict?

JUROR: We have, Your Honor.

THE COURT: Is that the unanimous verdict of the jury?

JUROR: Twelve yes votes.

THE COURT: Will you please read the verdict?

CLERK: In case number 15520, State of Alabama against Edward Boykin, Jr. We, the jury, find the defendant guilty of robbery as charged in the indictment on

his plea of guilty, and further find that he suffer death by electrocution. E. J. Strong, Foreman. Case number 15521, State of Alabama against Edward Boykin, Jr., We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman. In case number 15522, We, the jury, find the defendant guilty of robbery as charged in the indict- [fol. 24] ment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman. Case number 15523. We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr. Foreman. Case number 15526. We, the jury, find the defendant guilty of robbery as charged in the indictment on his plea of guilty and further find that he shall suffer death by electrocution. E. J. Strong, Jr., Foreman.

THE COURT: Have the defendant stand up, will you.

(Defendant rises and stands beside his attorney.)

THE COURT: Edward, do you have anything to say as to why sentence should not be imposed upon you?

DEFENDANT: No, sir.

THE COURT: Well, you have heard the verdict of the jury and the court is not going to make mockery of this jury by overriding the jury and making any recommendations at all, certainly not clemency or anything of that sort. It is now in the hands of the State and it is up to the Governer if he cares to do anything about it. It is not up to the trial judge. In case number 15520 the court will impose sentence according to the verdict of the jury and sentences you to death by electrocution. In case number 15521, the court again will follow the verdict of the jury and sentence you to death by electrocution. In case number 15522 the court will sentence you to death by electrocution. In case number 15523 the court sentences you to death by electrocution. In case number 15526 the court sentences you to death by electrocution.

DEFENDANT: Let me see my lawyer.

THE COURT: All right.

At 9:00 o'clock A.M. on September 21, 1966 the following occurred:

THE COURT: Young man I had to call you back to supply an omission in the sentence I imposed yesterday. The law requires that this court fix the date of the execution and inadvertently I failed to do that, so I am going to correct the verdict by supplying that omission. Again I ask you, do you have anything to say as to why the sen- [fol. 25] tence should not be be imposed?

DEFENDANT: I don't have anything to say. I would like to talk to my lawyer.

THE COURT: What? Talk to Mr. Austill?

DEFENDANT: Talk to my lawyer.

THE COURT: Mr. Austill, he wants to talk to you.

(Whereupon attorney and defendant have a conference.)

THE COURT: Do you have anything to say?

DEFENDANT: No.

THE COURT: Well, in case number 15520 the court imposes the following sentence: The court sentences you to suffer death by electrocution and fixes the date for December the 16th, 1966. In case number 15521 the court sentences you . . .

MR. PFLEGER: Judge, would you ask him again just so the record will reflect he has been asked in each case.

THE COURT: In case number 15521 taking property in the custody of or belonging to Jerry Smith, do you have anything to say as to why verdict should not be imposed—sentence should not be imposed in that case?

DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date, December 16th, 1966. In case number 15522 taking property of E. G. Campbell, do you have anything to say as to why sentence should not be imposed.

DEFENDANT: Yes, sir, I want to ask my lawyer something.

(Whereupon defendant and attorney have conference.)

DEFENDANT: No.

THE COURT: The court sentences you to death by electrocution and fixes the date of your execution December 16th, 1966. In case number 15523, taking the property belonging or in the custody of Sylvester Pugh, do you have anything to say as to why the sentence should not be imposed?

DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date of your execution as December 16th, 1966. In case number 15526, taking the property of or in the possession of J. V. Loper, do you have anything to say in that case as to why the sentence should not be imposed?

[fol. 26] DEFENDANT: No.

THE COURT: The court sentences you to suffer death by electrocution and fixes the date of your electrocution December 16th, 1966.

[Clerk's and Reporter's Certificates Omitted in Printing]

IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

vs.

STATE OF ALABAMA

MOBILE CIRCUIT COURT
March 6, 1967

Come the parties by attorneys and submit this cause on briefs for decision.

* * * *

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1967-68

1 Div. 403

EDWARD BOYKIN, JR.

v.

STATE OF ALABAMA

Appeal from Mobile Circuit Court

OPINION—February 8, 1968

COLEMAN, JUSTICE.

This is an appeal from a judgment convicting defendant of robbery and sentencing him to death by electrocution.

The record discloses that defendant pleaded guilty to five separate indictments charging him with committing five separate robberies, respectively. The instant case is No. 15520 in the circuit court. Defendant pleaded guilty to the indictment in the instant case.

The evidence shows that, on May 6, 1966, at about nine o'clock in the evening, defendant and a companion entered a drug store in Mobile. The person robbed, Mrs. Annette Fawcett, testified that defendant came into the store wearing a green beret; that he put some ice cream on the counter; that he also had a book which he put up against the wrapping counter; that the witness leaned over to see how wide the book was; that defendant reached over and grabbed the witness by her dress and said "Don't say a word."; that defendant pulled a gun out of the book and pointed the gun at the witness; that defendant pulled the witness back to where the adding machine was and the other boy came around to the register to open it; that defendant put the gun at the witness' back and kept on saying "Open the register, open it, open it."; that defendant kept on pushing it and it did open; that defendant took

from the cash registers the money which was about $373; that defendant took the witness back to the "wareroom and threw the gun back and forth"; that the witness looked at the gun and could see that it was loaded; that defendant said "And the keys, and the keys, and the keys; give me the geys, give me the keys."; that witness realized defendant wanted her car keys and then defendant decided he would take witness and a colored delivery boy with defendant in the witness' car; that they were going on out and the little girl in front who had run next door to get a loaf of bread walked in the door; that the girl said "Oh, my God, I'm shot."; that defendant had the pistol and it was fired; that the young girl was shot in the calf of her leg; that the witness did not get excited until the girl was shot; that witness thinks defendant intended to shoot just to frighten because the officer said "it" hit the floor; that the girl still has the bullet in her leg; that defendant was the only one that had the pistol.

Counsel for defendant argues two propositions for error. Counsel says the punishment for robbery must be imposed by the jury and that the record does not disclose compliance with statutory requirements since the judgment on September 21, 1966, was not the result of any jury verdict.

The record does not support defendant's contention. The judgment recites that a jury, E. J. Strong, Jr., Foreman, and eleven others do say:

> " 'We, the Jury, find the defendant guilty of Robbery, as charged in the indictment, on his plea of guilty, and further find that he shall suffer death by electrocution.' "

The court reporter's transcript of the evidence recites that "this cause came on for trial before the Honorable Walter F. Gaillard sitting as Judge of the said Court, and a Jury . . . ." The reporter's transcript further recites the reading of the jury's verdict by the clerk. Defendant's first contention is without merit.

Defendant's second contention is that capital punishment for robbery violates the constitutional safeguard against cruel and unusual punishment. The gist of defendant's argument is that the punishment of death is dis-

proportionate to the crime because defendant killed no person in committing the offense.

§ 415, Title 14, Code 1940, recites:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life. *Weems* v. *United States*, 217 U. S. 349, 370, 54 L. Ed. 793, 30 S. Ct. 544; note 4 in *Francis* v. *Resweber*, 329 U. S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374.

Any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual in the constitutional sense. Cooley, Constitutional Limitations, quoted in *Weems* v. *United States*, supra. Probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature. Cooley, quoted in *Weems* v. *United States*, supra. See also: *In re Kemmler*, 136 U.S. 436, 34 L. Ed. 519, 10 S. Ct. 930; *People ex rel. Kemmler* v. *Durston*, 119 N. Y. 569, 24 N. E. 6; Holmes, C. J., in *Storti* v. *Commonwealth*, 178 Mass. 549, 60 N. E. 210; *Dutton* v. *State*, 123 Md. 373, 91 A. 417; *In re Wells*, 35 Cal. 2d 889, 221 P. 2d 947, cert. den. 340 U. S. 937, 95 L. Ed. 676, 71 S. Ct. 483.

Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. *Franklin* v. *Brown*, 73 W. Va. 727, 729, 81 S. E. 405, L.R.A. 1915C 557. In Laws of Alabama, 1823, page 207, the punishment for robbery was death. In the Code of 1852, § 3104, page 563, punishment was ten years' imprisonment. Since the Revised Code of 1867, § 3668, any person convicted of robbery, must be punished, at the discretion of the jury,

either by death, or by imprisonment for not less than ten years; or, as in Code 1886, § 3742, by death or by imprisonment for not less than five years; or, as in Code 1896, § 5479, and subsequent codes, by death or by imprisonment for not less than ten years.

We are of opinion that the constitutional prohibition against cruel and unusual punishment has not been violated by the judgment in the instant case. Even in this latter day when some courts are criticized on the charge that they favor the robber more than the victim, we are of opinion that death is not a cruel and unusual punishment.

AFFIRMED.

Simpson and Merrill, JJ., concur.
Lawson, J., concurs specially.
Livingston, C. J., and Goodwyn and Harwood, JJ., dissent.

LAWSON, JUSTICE, concurring specially:

I agree that on the record before us the judgment of the trial court should be affirmed. The opinion of Mr. Justice Coleman, in my judgment, correctly disposes of the questions argued in brief of counsel for the appellant.

The record contains nothing to indicate that Boykin's plea of guilty was not voluntarily and knowingly made or that it was the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence. For aught appearing, the plea was entirely voluntary and Boykin fully realized and was competent to know and understand the possible consequences of such a plea. In briefs filed here on behalf of Boykin, by counsel who did not represent him at the trial below, it is not contended that Boykin did not voluntarily and knowingly enter the plea of guilty or that he did not fully realize the possible consequences of such plea.

I am not familiar with any holding of this court to the effect that when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determin-

ing that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea. And such is not, in my opinion, the holdings of the Mississippi Supreme Court in *Dickerson* v. *State*, 202 Miss. 804, 32 So. 2d 881, and *Yates* v. *State*, 251 Miss. 376, 169 So. 2d 792, cited and relied upon in the dissenting opinion.

In *Howard* v. *State*, (Ala. Sup. Ct.), 194 So. 2d 834, in reviewing the action of a trial court in a post conviction proceeding, we observed: "An accused's plea of guilty may be accepted only if it is made voluntarily and knowingly. If it appears that a guilty plea is the product of coercion, either metal or physical, or was unfairly obtained or given through ignorance, fear or inadvertence, it is void since it is a violation of constitutional safeguards." (194 So. 2d, 837-838) In my opinion the language just quoted is to the same effect as that quoted in the dissenting opinion from *Yates* v. *State of Mississippi*, *supra*.

Of course, a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant. But neither the Howard case, *supra*, nor the Mississippi cases, *supra*, hold that the record must affirmatively show that the trial judge made such a determination. The effect of the dissenting opinion is to presume that the trial judge failed to do his duty.

If the trial court did fail to make such an ascertainment, or if the appellant, Boykin, was not adequately represented in the court below, or if because of his youth or ignorance he was unable to fully comprehend the possible effect of having all five cases tried before the same unstruck jury, he can raise any or all of those questions in a petition for writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions. But, in my opinion, there is nothing in this record which would justify a reversal on any of those possible contentions.

GOODWYN, JUSTICE (dissenting):

This is one of five cases (the others being 1 Div. 403 A, 1 Div. 403 B, 1 Div. 403 C, and 1 Div. 403 D) in each of which Edward Boykin, Jr., the appellant in each

case, was indicted, tried, found guilty and sentenced to death by electrocution for a separate offense of robbery. At this arraignment and at his trial, he entered a plea of guilty in each of the cases. By agreement, all five cases were presented to the same jury.

Aside from any other reason, it is my view that the judgments in these five death cases should be reversed and the causes remanded to the trial court because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty. I think what was said in *Dickerson* v. *State*, 202 Miss. 804, 32 So. 2d 881, and *Yates* v. *State*, 251 Miss. 376, 169 So. 2d 792, 802, should be the rule in this State, viz:

> "* * * * * * We do not say that the trial judge may not accept a plea of guilty in a capital case, but if he does so he must see to it, first, that the plea is entirely voluntary and that the defendant fully realizes and is competent to know the consequences of such a plea, * * *."

It is to be noted that we are not dealing here with a case where there was an agreement between the district attorney and the defendant as to a sentence less than capital upon the entering by defendant of a guilty plea.

There is nothing in the record or briefs indicating the defendant's trial strategy in pleading guilty in these five cases.

Livingston, C. J., and Harwood, J., concur in the foregoing dissent.

IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

vs.

STATE OF ALABAMA

MOBILE CIRCUIT COURT

JUDGMENT—February 8, 1968

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment of the Circuit Court be in all things affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that Friday, April 5, 1968, be fixed as the date of execution of the defendant, Edward Boykin, Jr.

IT IS FURTHER ORDERED that the Sheriff of Mobile County, Alabama, deliver the defendant to the Warden of Kilby Prison, in Montgomery County, Alabama, and that the said Warden execute the judgment and sentence of the law on Friday, April 5, 1968, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Edward Boykin, Jr. until he is dead, and in so doing he will follow the rules prescribed by the statutes.

IN THE SUPREME COURT OF ALABAMA

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, GOODWYN, MERRILL, COLEMAN AND HARWOOD.

1st Div. 403

EDWARD BOYKIN, JR.

v.

STATE OF ALABAMA

MOBILE CIRCUIT COURT

ORDER OVERRULING APPLICATION FOR REHEARING—March 7, 1968

IT IS ORDERED that the application for rehearing filed on February 22, 1968, be and the same is hereby overruled.

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

1st Div. 403, 403A, 403B, 403C and 403D

EDWARD BOYKIN, JR.

vs.

STATE OF ALABAMA

APPEAL FROM MOBILE CIRCUIT COURT
March 18, 1968

WHEREAS, this Court did affirm the convictions of the death penalty imposed on the said Edward Boykin, Jr., in the above styled causes, on February 8, 1968, which date of execution is now set for April 5, 1968, and

WHEREAS, the application for rehearing in each case was overruled on March 7, 1968, and

WHEREAS, the said Edward Boykin, Jr. has filed an application for stay pending an appeal to the Supreme Court of the United States,

NOW, IT IS THEREFORE ORDERED AND ADJUDGED that the execution of the judgments and sentence be stayed and reset for Friday, June 28, 1968, and the sentence of this Court will, on said date, be carried out in all respects according to the laws of this State.

[Clerk's Certificate (Omitted in Printing)]

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

1st Div. 403, 403A, 403B, 403C and 403D

EDWARD BOYKIN, JR.

v.

STATE OF ALABAMA

MOBILE CIRCUIT COURT
June 17, 1968

WHEREAS, this Court did affirm the convictions of the death penalty imposed on Edward Boykin, Jr. in the above styled causes on February 8, 1968, and set the date of execution for Friday, April 5, 1968; and

WHEREAS, the application for rehearing in each cause was overruled on March 7, 1968; and

WHEREAS, on March 18, 1968, this Court stayed the execution of the judgments and sentence and reset the execution for Friday, June 28, 1968; and

WHEREAS, the said Edward Boykin, Jr. has filed an application for further stay of the execution pending consideration of a petition for writ of certiorari in these causes by the Supreme Court of the United States.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the execution of the judgments and sentence be stayed pending the disposition of the proceedings in these causes in the Supreme Court of the United States and the further orders of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that this Court hereby retains jurisdiction of these causes for any further or additional orders that may be necessary.

[Clerk's Certificate (Omitted in Printing)]

SUPREME COURT OF THE UNITED STATES

No. 329 Misc., October Term, 1968

EDWARD BOYKIN, JR., PETITIONER

v.

ALABAMA

On petition for writ of Certiorari to the Supreme Court of the State of Alabama.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 642 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 14, 1968

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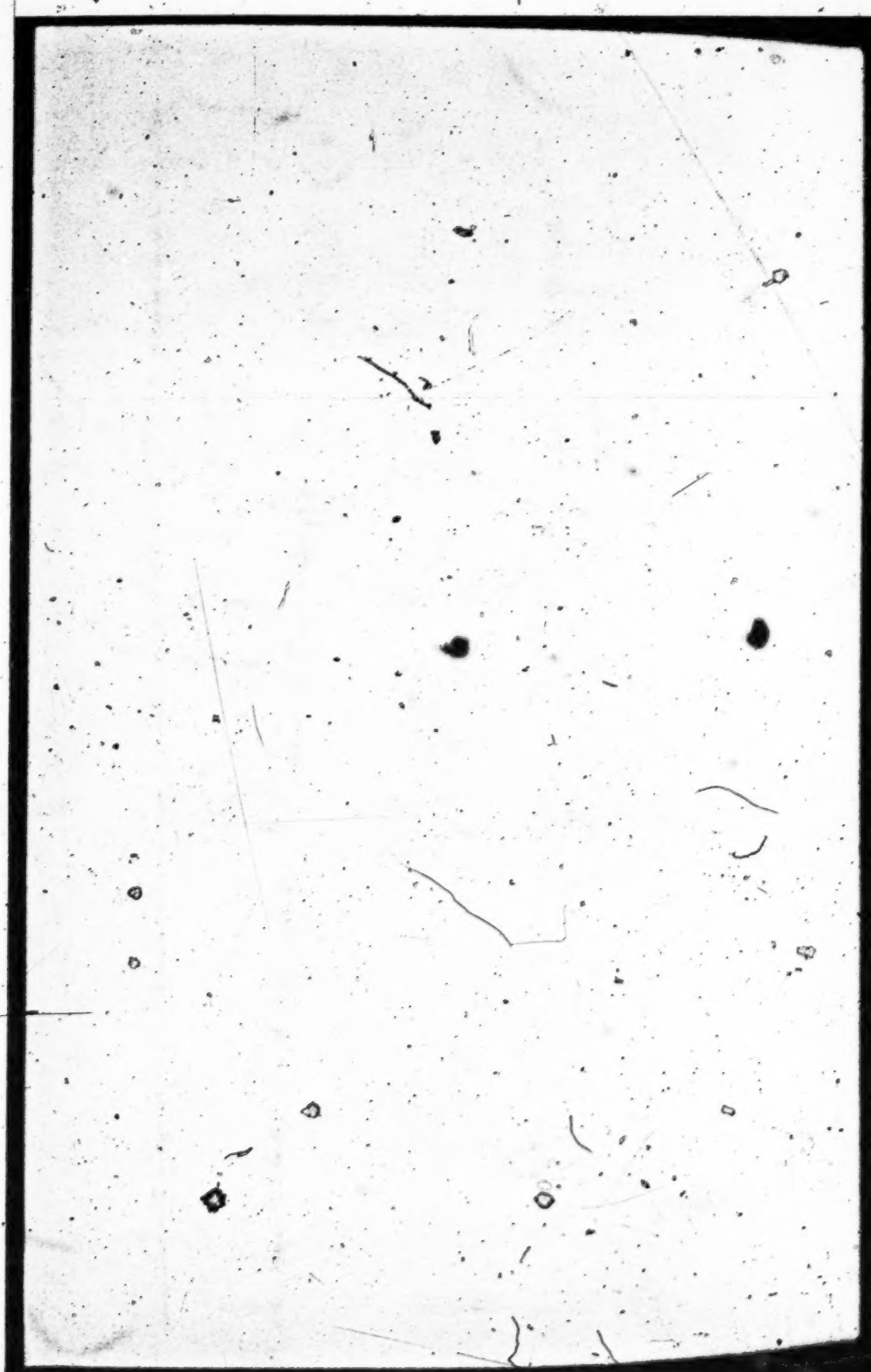

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IN THE

Supreme Court of the United States

October Term, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT, AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT, AS *AMICI CURIAE*

Interest of the *Amici Curiae*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Under its charter, one of its purposes is to provide free legal assistance to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel.[1] For many years, the

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[1] The Fund's charter was approved by a New York court, authorizing the organization to serve as a legal aid society. It is entirely independent of other organizations, and is supported by contributions from the public.

Fund's attorneys have represented in this Court and the lower courts persons charged with capital crimes, particularly Negroes charged with capital crimes in the Southern States.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived and friendless, who too often are Negroes. To further this purpose, the Fund in 1965 established a separate corporation, the National Office for the Rights of the Indigent (NORI), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor.[2]

The long experience of Fund attorneys in the handling of death cases has led us to the view—confirmed by the studies of scholars[3] and more recently by empirical research undertaken under the Fund's auspices[4]—that capital punishment is administered in the United States in a fashion that consistently makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other grave injustices are referable in part to fundamental characteristics of the death penalty as an institution in modern American society,[5] and in part to common practices in its

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[2] NORI's income has been initially provided by a grant from the Ford Foundation.

[3] See note 50 *infra*.

[4] See pp. 52-53 *infra*.

[5] See pp. 41-61 *infra*.

administration which depart alike from the standards of an enlightened criminal justice[5] and from the minimum

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[5] In virtually every State today, the death penalty is administered by a set of procedures which, to say the least, are strikingly unfair to the accused and likely to produce extreme arbitrariness in the selection of the men to be killed. We summarize those procedures:

(1) On voir dire examination, persons having conscientious scruples against the imposition of capital punishment are excused for cause from the trial jury. Of course, this Court's decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), disallowed one common form of "death-qualifying" capital juries. But *Witherspoon* has been given a very narrow reading by the state courts in its application to pre-*Witherspoon* trials, e.g., *State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968); *Pittman* v. *State*, Tex Crim. App., No. 41,393, decided July 24, 1968; and death-qualification proceedings in forms not explicitly outlawed by the square *Witherspoon* holding have been practiced in virtually all of the state courts of which we are aware in trials held since *Witherspoon*. The immediate effects of this practice are several. First, it indirectly achieves what the States are forbidden directly to achieve: the systematic limitation of racial and other minority groups and of women—populations disproportionately characterized by death scruples. Second, it delivers over the administration of justice in trials for the most serious crimes known to our society, bearing the most serious penal exaction that human society can levy against a defendant, to an unrepresentative sub-group of the community, comprising its most punitive, ataviastic and uncompassioned members. Third, in the process of *voir dire* questioning by which the jury is death-qualified, it reinforces the very attitudes of punitiveness and uncompassion by which the jurors allowed to serve are natively characterized, driving home the message that any *principled*, ideologically-derived determination against the death sentence for the offense on trial is forbidden to the jury, and, indeed, that the attitudes of mercy and compassion which may undergird such a determination are legally disfavored and morally unfit.

(2) The capital case is then tried to the jury so selected, which determines both the question of guilt and that of punishment. Ordinarily, these two determinations are made simultaneously—by the traditional "single-verdict" procedure, as distinguished from the two-staged, "split-verdict" procedure used in a handful of jurisdictions. Under this single-verdict procedure, the jury hears

requirements of fairness and even-handedness fixed by the Constitution of the United States for proceedings by which

all the evidence bearing on guilt or on punishment *before* retiring to decide the guilt question, then returns with a single verdict which adjudges guilt or innocence and fixes the punishment for guilt at death or something less. There is no separate hearing on the question of sentencing, and no opportunity—other than the guilt trial—to present to the jury evidence of the defendant's character and background, pertinent to the death-life choice. At the guilt trial, the prosecution is usually forbidden to open up, in its case in chief, matters relating to the defendant's character and background. The defendant may open up the character question, subject to rebuttal by prosecution evidence of bad character, damningly prejudicial on the guilt determination. And, of course, the defendant may make a personal appeal for mercy—may personally address those persons who hold his life in their hands—only by taking the stand generally, thereby waiving the Privilege against Self-Incrimination. This is a practice that, as the Reporters of the Model Penal Code have noted, forces the capital defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of sentence." American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at p. 74. Specifically, the defendant is whipsawed between his Constitutional Privilege and his right to present evidence that is requisite to rational sentencing choice. A defendant who believes that he has any chance of acquittal of a capital charge will often choose to avoid prejudicing that chance by expansion of the trial record into background and character matters that make him appear guilty—he will, in short, exercise the Privilege. Under single-verdict procedure, the result frequently is that capital sentencing is done by a jury that knows next to nothing about the person of the defendant, and has not even heard him speak in favor of his life.

(3) But the jury is not merely deprived of factual information essential to a reasoned sentencing decision. It is also deprived of any sort of legal standards or guidelines for making the decision. Under ubiquitous American capital trial procedure, the decision between the death penalty and lesser alternatives to it is required to be made by the jury in its unguided, unfettered and unreviewable discretion—according to whatever whims or urges may move it. This most momentous of human decisions is unlike any other made by a jury in a purportedly legal proceeding; it is not made pursuant to rules of law or within the limitations of any sort of regular, uniform or generalized doctrines or principles. Rather it

human life may be taken. Finally, we have come to appreciate that in the uniquely stressful proceedes of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many pressures and conflicts may impede the presentation of effective attacks on these unfair and unconstitutional[7] practices; and that

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is avowedly *ad hoc, ex post facto* and—because it neither does nor need respond to any rational conception of punishment or sanctioning—wholly arbitrary. Little wonder that, in the actual administration of capital sentencing, jurors have been shown to use this lawless discretion lawlessly, and to discriminate racially, for example, in sentencing men to death. See pp. 51-53 *infra*.

(4) The jury's sentencing decision is not ordinarily judicially revisable. It is, of course, subject to correction by the exercise of executive clemency; but this sort of gubernatorial dispensation is administered still more irregularly than the jury's decision itself. Procedures for the clemency determination are unformulated; standards to guide it are non-existent; and, by this stage, the condemned man is usually indigent, unrepresented and legally helpless. See note 8 *infra*. Political and other considerations nevertheless do bring about a substantial number of commutations; and, at the conclusion of the process of a Nation's administration of capital justice for any year, only a few random, arbitrarily selected men are put to death. Their executions are as futile and purposeless as they are unusual and arbitrary. For there is simply no evidence that capital punishment serves any legitimate end or purpose of the criminal law—deterrence, incapacitation, reformation—which lesser exactions do not; and the very strong weight of expert opinion vigorously denies that it does. See n. 53 *infra*. Whatever penal efficacy the death penalty might have if regularly, uniformly and fairly administered in all cases where it was allowed by law is nullified by its actual rare and haphazard application, see pp. 41-61 *infra*, with the result that the penalty is left altogether without redeeming social value.

[7] The specific constitutional claims to which the procedures described in footnote 6, *supra*, give rise may be briefly characterized as follows:

(1) The systematic exclusion of death-scrupled jurors under practices not condemned outright by *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), nevertheless offends the Constitution because (i) it deprives capital defendants of a trial by a jury that is a cross-section of the community, in violation of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Four-

in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the in-

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tenth; and (ii) it results in a biased and prosecution-prone jury, unable to accord the defendant a fair trial on the issue of guilt, in violation of the Due Process Clause. See Petition for Certiorari, in *Forcella and Panicello v. New Jersey*, O.T. 1968, No. 947 Misc., pp. 69-74, 80-85.

(2) The practice which commits the sentencing decision in capital cases to the undirected, unlimited and unreviewable discretion of the jury violates the rule of law basic to the Due Process Clause. See Petition for Certiorari, *Johnson v. Virginia*, O.T. 1968, No. 807 Misc., pp. 12-16; Petition for Certiorari, *McCants v. Alabama*, O.T. 1968, No. 937, Misc., pp. 15-20; Petition for Certiorari, *Maxwell v. Bishop*, O.T. 1968, No. 622, pp. 58-65. See also Part III, *infra*, of this brief.

(3) The single-verdict procedure whereby a trial jury in a capital case simultaneously hears evidence pertinent to guilt and to sentencing, and returns a single verdict speaking to both issues, is constitutionally deficient because (i) it compels the defendant to a choice between his constitutional right of allocution (and to present evidence requisite to rational sentencing choice) and his Privilege against Self-Incrimination, and (ii) it results in an unfair trial on either the guilt issue, or the sentencing issue, or both. See Petition for Certiorari, *Johnson v. Virginia*, *supra*, pp. 17-23; Petition for Certiorari, *Maxwell v. Bishop*, *supra*, pp. 65-74; Petition for Certiorari, *Mathis v. New Jersey*, O.T. 1968, No. 683 Misc., pp. 45-55.

(4) Capital punishment is a cruel and unusual punishment within the condemnation of the Eighth Amendment as incorporated into the Fourteenth, because (i) it involves brutal and unnecessary physical and psychological cruelty; (ii) is abhorrent to civilized standards of decency; and (iii) is justified by no rational purpose of society, at least where it is administered (iv) as a rare and unusual penalty, (v) invoked in the unconfined, uninformed and arbitrary discretion of the sentencer, and (vi) under procedures which fail to assure considered and rational judgment by the sentencer of circumstances in mitigation and the absence of circumstances in aggravation that would render imposition of the death sentence cruel and unusual on the facts of particular cases. These issues, in contention in several litigations in the lower courts, are of course broader than those discussed in Part II, *infra*, of this brief.

(5) In many States, it can be empirically demonstrated that sentencing juries have utilized the unfettered discretion given them in capital sentencing by discriminating racially in the imposition of

mates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in the face of death.[4] Common state prac-

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death sentences. In these States, where there can be shown a long-continued pattern and practice of applying the sentence of death with extreme disproportionate frequency against Negro defendants convicted of offenses (particularly rape) against white complainants or victims, such Negro defendants are denied the equal protection of the laws guaranteed by Rev. Stat. §1977 (1875), 42 U.S.C. §1981 (1964), and by the Fourteenth Amendment. See Petition for Certiorari, *Maxwell* v. *Bishop; supra*, pp. 9-33, 35-58.

[4] Recently, in connection with the case of *Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J, described *infra*, Fund lawyers were authorized by federal court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes to declare their constitutional right to the appointment of counsel); 11 others were represented by volunteer lawyers associated with the Fund or the ACLU; and in the case of two more, the status of legal representation was unascertainable. All 34 men (and all other men interviewed on the row) were indigent; the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution and maintenance of legal proceedings) was below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial laborers; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed). These findings parallel both those of scholars who have undertaken to describe the characteristics of the men on death row, e.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165 (1957), and of officials experienced in dealing with death-row inmates, e.g., DiSalle, *Comments on Capital Punishment and Clemency*, 25 Ohio St. L.J. 71, 72 (1964): "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective." *Accord*: Lawes, Twenty Thousand Years in Sing Sing (1932)

tice makes no provision for the furnishing of legal counsel to these men.[9]

For these reasons, *amici* Legal Defense Fund and NORI have undertaken a major campaign of litigation challenging the death penalty as a cruel and unusual punishment, and assailing on federal constitutional grounds several of the most vicious common practices in its administration.[10]

302, 307-310. And even within this deprived group, racial minorities are the objects of especial deprivation. It has been found, for example, that Negroes are significantly less able than whites to procure the stays necessary for pursuit of legal remedies (as measured by median time between sentence of death and execution), McCafferty, *The Death Sentence, 1960,* in BEDAU, THE DEATH PENALTY IN AMERICA (1964) [hereafter cited as BEDAU], 90, 95-96, one factor that doubtless contributes to the significantly greater success of whites than Negroes in having death sentences commuted, e.g., Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962).

[9] Just last month, in a litigation presented by Fund attorneys claiming the right of indigent condemned men to assistance of counsel during the post-appeal period, the Supreme Court of California "determined that the appointment of counsel to represent indigent defendants in capital cases in all proceedings between the termination of their state appeals and their execution, such as petitions for certiorari, habeas corpus petitions to state and federal courts, applications for executive clemency and the conduct of sanity hearings where indicated, will best serve the cause of justice, the interests of the defendants and this court. Counsel will be appointed routinely in the future in all such cases as a matter of policy." *In re Anderson and Saterfield,* Cal. S.C., Crim. Nos. 11572, 11573, decided November 18, 1968, p. 24b, *infra.* In New Jersey, the State Public Defender has announced his obligation to provide similar representation for all indigent condemned men in that State. See the Petition for Certiorari, in *Forcella and Funicello v. New Jersey,* O.T. 1968, No. 947 Misc., p. 5, n. 1. We know of no other State in which adequate provision is made for the post-conviction representation of indigent condemned men.

[10] See the Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, in *Witherspoon v. Illinois,* O.T. 1967, No. 1015 and *Bumper v. North Carolina,* O.T. 1967, No. 1016, pp. 12-14 n. 30.

Fund and NORI attorneys, with the cooperation of other lawyers, instituted class actions on behalf of the approximately 60 condemned men on death row in Florida (*Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J) and the more than 80 condemned men on death row in California (*Hill* v. *Nelson*, N.D. Cal., No. 47318; *In re Anderson and Saterfield*, Cal. S.C., Crim. Nos. 11572, 11573), which have resulted in interlocutory class stays of execution for all men under sentences of death in both States.[11] In addition to the 140 inmates represented in these class actions, our attorneys have major responsibility for handling almost half a hundred pending cases of men sentenced to death in ten other States, and are cooperating with, or providing services to, attorneys handling half a hundred more across the country. Counsel for *amici* have pending on petitions for certiorari in this Court, *inter alia*, the following death cases: *Maxwell* v. *Bishop*, O.T. 1968, No. 622; *Johnson* v. *Virginia*, O.T. 1968, No. 307 Misc.; *Mathis* v. *New Jersey*, O.T. 1968, No. 683 Misc.; *McCants* v. *Alabama*, O.T. 1968, No. 937 Misc.; *Forcella and Funicello* v. *New Jersey*, O.T. 1968, No. 947 Misc. In each of these cases, at least one issue involved in the present *Boykin* case is presented.

The issues raised in *Boykin* are of literally vital significance to the more than 400 men on death row in the

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[11] On November 18, 1968, the California Supreme Court delivered its opinions in the *Anderson and Saterfield* cases, rejecting by a 4-3 vote all federal constitutional attacks on the death penalty in California. The court vacated Anderson's and Saterfield's death sentences for constitutional error in the selection of their trial juries under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), however; and its previously issued stay of execution for all condemned men in the State remains in effect at this date. See Appendix B *infra*.

The numbers of condemned men in California and Florida are given as of this time, not as of the time of initiation of the respective lawsuits.

United States, an increasing number of whom (now amounting to over half their total number) we directly or indirectly represent. The lives of each of these men may well turn on what the Court decides and says—or does not decide or does not say—in the present case. For this reason, we respectfully present on their behalf our views upon the case before the Court. The parties have consented to the filing of this *amicus curiae* brief, and copies of their letters of consent will be submitted to the Clerk with the brief.

Opinions Below

The several opinions of the Justices of the Supreme Court of Alabama affirming by a divided court Edward Boykin's conviction and sentence of death are reported at 281 Ala. 659, 207 So.2d 412. They are found in the Appendix [hereafter cited App. ....] at 36-41.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on February 8, 1968, App. 42. Rehearing was denied by order of March 7, 1968, App. 43. The petition for certiorari was filed on June 4, 1968, and was granted by order of October 14, 1968, App. 46. Jurisdiction of this Court rests on 28 U.S.C. §1257(3) (1964).

Questions Presented[12]

1. Whether the Supreme Court of Alabama erred in affirming Boykin's capital conviction and sentence of death upon a guilty plea, where the record does not reflect that the trial court made appropriate inquiry to assure that the plea was voluntary and understanding as required by the Fifth and Fourteenth Amendments?

2. Whether Boykin's sentence of death for the crime of simple robbery, upon this record, violates the prohibition against cruel and unusual punishments contained in the Eighth and Fourteenth Amendments?

3. Whether Alabama's practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to choose between the punishments of death or imprisonment for the crime of robbery violates the rule of law fundamental to the Due Process Clause of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

It also involves CODE OF ALABAMA, tit. 14, §415 (1959), which is as follows:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

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[12] At pp. 69-73 *infra*, we note several other issues that may appear to lurk in the case but are not, in our judgment, presented by it.

Statement

Edward Boykin, Jr., was charged in five separate indictments, filed in the Circuit Court of Mobile County, Alabama, with the crime of robbery. App. 1, 36. Under Ala. Code, tit. 14, §145 (1959), set out at p. 11, *supra*, simple robbery is punishable by death or by imprisonment for not less than ten years, in the discretion of the jury. Section 415 fixes the penalty for the crime of robbery but does not define it; the elements of simple robbery are defined in Alabama by the common law.[11] Pursuant to the common-law definition, each indictment charged Boykin with feloniously taking a sum of money from the person of a named complainant against the complainant's will, by violence to the complainant's person or by putting the complainant in such fear as unwillingly to part with the money. App. 1.

July 11, 1966, Boykin was interrogated by the court and found to be unrepresented and indigent. He said he did not want counsel, but the court deemed counsel necessary and appointed a lawyer. App. 2-3. July 14, Boykin appeared with appointed counsel for arraignment on the five robbery charges, pled guilty to each, and was remanded for sentencing. The minute entry for this date consists of eleven lines reciting his appearance, the presence of his lawyer, and his plea. App. 4. Unlike the minute entry of July 11, it does not reflect that Boykin was addressed or questioned by the court, or that he said a word.

September 30, 1966, Boykin's five robbery charges were presented to a jury for trial and sentencing on his guilty pleas. App. 4-5. The prosecution presented seven witnesses who testified concerning the events of five robberies com-

[11] See *Morris* v. *State*, 97 Ala. 82, 12 So. 276 (1893); *Higgs* v. *State*, 113 Ala. 36, 21 So. 353 (1897); *Tanstill* v. *State*, 33 Ala. App. 460, 34 So.2d 857 (1948).

mitted in Mobile between April 23 and May 8, 1966. Each identified Boykin as the robber. In each of the five robberies, Boykin was apparently armed with a gun. Three times he had an accomplice; twice he did not. Three times he did not fire his gun; once he fired a warning shot that hit no one; once he fired a shot that ricochetted and hit a girl in the leg. The sole witness to this last episode testified that she did not think Boykin intended to shoot the girl. App. 20, 21. The amounts taken in the robberies ranged from $140 to $373.[14]

In general, the prosecution witnesses gave terse eyewitness descriptions of the several robberies. Cross examination was minimal. The defendant did not testify and presented no witnesses. No evidence was proffered or received relating to the defendant's character or background. In short, the jury knew nothing about Edward Boykin except his conduct during five robbery episodes, each lasting a few minutes, occurring within a period of about two weeks. The court's entire charge was as follows:

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[14] The five robberies were as follows:

On April 23, the Dairy Castle was robbed. Witnesses were Mr. Smith (App. 22) and Mr. Hersh (App. 24). About $209 was taken. The robber was alone. He had a gun, did not fire it.

On May 3, a service station was robbed. Witness was Mr. Pugh (App. 29). About $158 was taken. The robber had an accomplice. He had a gun, did not fire it.

On May 5, a general store was robbed. Witness was Mr. Campbell (App. 25). About $140 was taken. The robber had an accomplice. He had a gun, did not fire it.

On May 6, a drug store was robbed. Witness was Mrs. Fawcett (App. 16). About $363 was taken. The robber had an accomplice. He had a gun, fired a shot which ricochetted from the floor and hit a girl in the leg. Mrs. Fawcett thought the shot was fired to frighten, without intention to hit the girl.

On May 8, Pak-a-Sak was robbed. Witnesses were Mr. Loper (App. 11) and Mr. Weaver (App. 13). About $262 was taken. The robber was alone. He had a gun, fired a warning shot in leaving. The shot struck the ceiling, fell back hitting no one.

"THE COURT: Some of you gentlemen were on the jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict." (App. 32.)

When it arrived at its verdict, the jury used the death forms. It thereby found Edward Boykin guilty of five robberies and sentenced him severally to die for each. App. 32-33. Judgment of five death sentences was entered. App. 4-5, 33.[15]

On appeal, the Supreme Court of Alabama affirmed the death sentences. An opinion having the concurrence of

[15] This judgment of September 20 was technically defective, in that the judge "inadvertently" failed to fix the execution date as required by law. App. 34. Accordingly, the sentence was set aside the same day, App. 5-6, and Boykin was resentenced on September 21, App. 6-8, 34-35. The proceedings on this latter date were formal and added nothing of substance to what had gone before.

four Justices rejected Boykin's claim that he had been subjected to cruel and unusual punishment forbidden by the federal Constitution. App. 36, 37-39. The opinion made mention of none of the other federal claims urged in Boykin's behalf. Three Justices dissented and voted to reverse the five judgments of death because the record did not show that Boykin's plea of guilty to five capital charges had been made knowingly and understandingly. App. 40-41. A fourth Justice, whose concurrence was necessary to the affirmance, addressed this issue in a separate opinion which expressly denied that "when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determining that the plea was voluntarily and knowingly entered and that the defendant fully realized and was competent to know the consequences of such a plea." App. 39-40. The plurality opinion for affirmance did not discuss this point.

ARGUMENT

I.

The Supreme Court of Alabama Erred in Affirming Boykin's Convictions of Five Capital Offenses and Five Death Sentences Upon a Guilty Plea, Where the Record Does Not Show That the Trial Court Made Constitutionally Requisite Inquiry to Assure That the Plea Was Voluntary and Understanding.

The issues of widest importance in this case, and those in which *amici* are principally interested, are the questions whether Edward Boykin's sentence of death for simple robbery violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishments (discussed in Part II, *infra*, of this brief), and whether its imposition in the unfettered discretion of a jury, which was empowered by Alabama law to choose between the penalties of death and imprisonment arbitrarily, capriciously, for any reason, or for no reason, violates the rule of law basic to the Due Process Clause (discussed in Part III, *infra*). We must note at the outset, however, that in our view the judgment of conviction and sentence below cannot be sustained on this record consistently with the Constitution, and that reversal is required for a reason quite independent of the two important issues presented relating to the validity of the death penalty. That reason may be briefly stated: the record below does not show compliance with requirements of the Fifth and Fourteenth Amendments in the taking of Boykin's guilty plea.

Three days after the first appointment of counsel, this indigent defendant was arraigned on five separate capital charges and pleaded guilty to all of them. These circumstances alone are cause for the gravest concern. In the

absence of some deal or understanding that excludes the death penalty, it is simply inconceivable that—on three days total time to investigate five distinct robbery charges—a plea could be entered which exposes the defendant to electrocution. One cannot say, and cannot imagine, what could have been in the mind of Boykin or his appointed lawyer. The record contains not one word concerning the circumstances of the plea, except that Boykin was in court and also "Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court." App. 4. No inquiry was put on the record as to whether the plea was entered understandingly or ignorantly, freely or under inducement. The inference is strong that no such inquiry was made, for the minute entry reciting Boykin's plea reflects no interrogation of the defendant by the court, while a similar minute entry on the occasion of Boykin's earlier appearance for appointment of counsel relates in detail questions put by the court and answers by Boykin. App. 2-3, 4. On the date of his plea, there is no indication that the court addressed Boykin, or that he himself said anything. For aught that appears, the judicial confessions by which his life became forfeit were made on his behalf without his personal participation. Cf. *Brookhart* v. *Janis*, 384 U.S. 1 (1966). As this Court said in another connection: "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process a meaningless symbol." *Chambers* v. *Florida*, 309 U.S. 227, 240 (1940).

We submit that the Constitution will brook no such summary procedure for the taking of a guilty plea in a capital case. Boykin's plea constituted, of course, a waiver of his rights to contest guilt and to insist that the prosecution prove him guilty at a trial. These are federal rights, secured by both the Fifth Amendment Privilege against Self-Incrimination and the Fourteenth Amendment guarantee of

due process. See *United States* v. *Jackson*, 390 U.S. 570 (1968); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). The question of their effective waiver is therefore governed by federal standards. E.g., *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *O'Connor* v. *Ohio*, 385 U.S. 92 (1966). Those standards are designed to give adequate and practical protection to the underlying federal right—protection which requires, in the case of the guilty plea, assurance that the plea is understanding and voluntary. E.g., *Waley* v. *Johnston*, 316 U.S. 101 (1942); *Machibroda* v. *United States*, 368 U.S. 487 (1962); and see *Shelton* v. *United States*, 356 U.S. 26 (1958) (mem).

Miranda v. *Arizona*, 384 U.S. 436 (1966), exemplifies the procedural protections with which this Court has surrounded the Privilege and which govern its waiver: Significantly, *Miranda* holds that a prosecutor cannot introduce an accused's station-house confession until the prosecution has affirmatively spread on the record all of the prerequisites for a valid waiver of the Privilege. This holding marked an enlargement of the accused's safeguards in the station house, but it was no constitutional innovation. Well before *Miranda*, the Court had insisted that the waiver of federal constitutional rights in *judicial* proceedings appear affirmatively on the record. *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Doughty* v. *Maxwell*, 376 U.S. 202 (1964) (mem). That rule continues to be applied. See *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Burgett* v. *Texas*, 389 U.S. 109, 114-115 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967) (Mempa's case).

Specifically, *Carnley* v. *Cochran*, *supra*, declares that: "Presuming waiver from a silent record is impermissible." 369 U.S. at 516. If that is true of the Sixth Amendment right to counsel involved in *Carnley*, it must be equally true

of the Fifth and Fourteenth Amendment rights surrendered by a guilty plea. The reasons, in each case, for requiring that the circumstances relied upon to constitute a waiver of vital federal rights appear affirmatively on the record are the same. For where either a waiver of counsel or a guilty plea is received in open court, only the affirmative assumption by the trial judge of responsibility to bring out the facts surrounding the waiver or the plea can protect the accused's constitutional interests. This is so because in both cases the very circumstances that would render the waiver or the plea unconstitutional—ignorance, incomprehension, coercion, terror, inducements—would also operate to cover up any appearance of unconstitutionality, and to stifle the accused's ability to complain of it.

It is no accident that this Court has repeatedly stressed the affirmative duty of a trial judge to make adequate inquiry of the accused before accepting a waiver of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938); *Von Moltke* v. *Gillies*, 332 U.S. 708, 722-723 (1948) (plurality opinion); *Carnley* v. *Cochran*, *supra*, 369 U.S. at 514-515; *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). No less stringent duty, surely, devolves upon the judge taking a guilty plea. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). In a guilty-plea case, the plea *is* the trial, and special considerations call for the court's special solicitude.

In the first place, an accused who enters a plea wants it to be accepted—whether or not this desire is the product of ignorance, inducements or fears. It is not then in his interest, nor that of his lawyer, to raise matters which will

arouse suspicion, and possibly "queer" the taking of the plea. Unless the judge makes affirmative inquiry, no protection is afforded the accused by the proceeding.

Second, the plea is the be-all and the end-all of the accused's right to defend. Once it is accepted, his guilt is determined; and the only remaining question concerning the guilt determination is whether the plea was valid. On this dispositive question, the accused has the right to an adequate record, and to such appellate review as the State affords. Denial of an adequate record for review would itself be a denial of due process. *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961); *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967). But, as a practical matter, for the reasons we have stated no such record can be made unless the presiding judge undertakes to make it.

We do not say that a plea of guilty could not constitutionally be taken in traffic court in the manner in which Boykin's plea was taken. The matter would be more questionable if the plea were to a minor misdemeanor. But in a capital case, surely, fitting federal standards for the waiver of the federal right to contest guilt demand something more. For, as this Court recognized in *United States* v. *Jackson*, 390 U.S. 570 (1968), the pressures of a capital charge exert unique stress on the accused to waive his rights upon the inducement, or in the mistaken hope that he will thereby avoid the death sentence. Also, it can hardly be denied that what is at stake for the accused facing death demands the utmost solicitude of which courts are capable. More than ordinary care in the handling of death cases has long been the constitutional rule. For its varying exemplifications, see, e.g., *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Stein* v. *New York*, 346 U.S. 156, 196 (1952). "The differentiation between capital and non-capital offenses is the basis for dif-

ferentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). We submit that it is plainly relevant where a judge takes an accused's guilty plea to five capital charges with no more concern for his protection than would attend a plea to a vehicle-code violation.

We might add—although we think the point hardly necessary—that there is demonstrably nothing to be said *against* a requirement that a judge who takes a capital plea in open court must establish on the record the prerequisites to its validity. Objectors to *Miranda* have complained, at least, that legitimate police investigative practices were impeded by the rules laid down in that decision. But no one has ever supposed that it is a legitimate judicial practice, or one in the interest of the State, to take ignorant or involuntary pleas of guilty in a death case. There is, indeed, hardly even an interest of convenience in permitting the judge to take his pleas without inquiry, for inquiry is a simple enough matter in most cases. Here it might well have taken little longer than the time consumed by the court's belated and futile inquiries: "do you have anything to say as to why the sentence should not be imposed," repeated five times at the prosecutor's instance just before the entry of the five judgments of death that capped Edward Boykin's unexamined plea. App. 34-35.

For all of these reasons, we submit that the three dissenting Justices below were plainly right, as a matter of federal constitutional law, in concluding that the "judgments in these five death cases should be reversed and the causes remanded to the trial court because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." The plurality opinion below does not speak to the point, and the only explanation for the affirmance by the Supreme Court of Alabama on this record is that offered in the special concurring opinion

of Justice Lawson. App. 39-40.[16] Justice Lawson rejects the view of the dissenters because they "presume that the trial judge failed to do his duty." App. 40. Unhappily, it is in the nature of a silent record that one can draw conclusions from it only by presuming one thing or another; and the contrary presumption—that the trial judge did do his duty—is firmly foreclosed by *Carnley* v. *Cochran, supra.*

Justice Lawson takes the position, alternatively, that there is no need for the trial judge who accepts a guilty plea to put on record his inquiries into the constitutional requisites of the plea because the defendant who complains of the plea can later "raise all of [his] . . . questions in a petition for writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions." App. 40. We can see no virtue whatever to a plea-taking procedure that would cast the burden of determining the validity of guilty pleas entirely on the post-conviction courts. *Cf. In re Gault,* 387 U.S. 1, 58 (1967). But, however this may be, the principle proposed by Justice Lawson as a rule to govern waiver of Fifth and Fourteenth Amendment rights has two overwhelming vices which require its rejection here. First, even in a non-capital case it throws an unacceptable burden on the accused.

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[16] There seems to be no question that the issue was properly before the Supreme Court of Alabama. Four of the seven Justices of that court expressly addressed it on the merits, and the remaining three, who kept silent about it, did not suggest that it was not preserved. In the nature of things it is implausible to suppose, and therefore impermissible to demand, that a challenge to the validity of a guilty plea be made in the trial proceedings where the plea is taken. As we have said in the text, *supra*, the principal reason for imposing a constitutional obligation upon the presiding judge to inquire into the validity of the plea before accepting it is that the defense is in no position to object to the taking of a plea which—whether for valid or invalid reasons—the defendant and his lawyer are eager to have the court accept.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing —if he can—that he had not [validly waived his federal constitutional right]. . . . To cast such a burden on the accused is wholly at war with the standard of proof for waiver which we laid down in *Johnson* v. *Zerbst*. . . ." (*Carnley* v. *Cochran, supra,* 369 U.S., at 514.)

Second, it is indefensibly callous with regard to the peculiar plight of the capital accused. Alabama practice—like that in most States[17]—affords an indigent condemned man no right to the appointment of counsel beyond the stage of the direct appeal. There is therefore no assurance that a coram nobis or other post-conviction petition will ever be filed, or that the accused will survive long enough to file it. A man in Boykin's position, whose guilty pleas have never been examined by any court prior to the termination of his appeal, is promised an examination if, unaided, he can get a stay of execution and bring his claims to court, upon proper allegations, before the State kills him. We suggest that such a scheme is constitutionally intolerable.[18]

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[17] See notes 8, 9 *supra.*

[18] This Court need not now decide what would be the remedy if, in a post-conviction proceeding, a petitioner demonstrated that his plea of guilty to a capital charge was taken without the constitutionally requisite inquiry. See the decisions holding that, in federal post-conviction proceedings under 28 U.S.C. § 2255 (1964), a showing of non-compliance with Fed. Rule Crim. Pro. 11 in the taking of a guilty plea casts the burden of proof on the Government to show retrospectively that the plea was voluntary and understanding, but does not *per se* require the vacating of the plea. *Domenica* v. *United States,* 292 F.2d 483 (1st Cir. 1961); *Reed* v. *United States,* 291 F.2d 856 (4th Cir. 1961). The present case is before this Court not on collateral attack, but on direct review. If there was error below, by federal constitutional standards, as we submit there obviously was, the judgment of the Alabama Supreme Court affirming Boykin's conviction and sentence cannot stand, and must be reversed.

II.

Boykin's Death Sentence Offends the Eighth Amendment.

We come to the question whether Edward Boykin's sentence of death by electrocution for simple robbery violates the Eighth Amendment prohibition of cruel and unusual punishment.[19]

We venture to suggest that the answer to that question would appear easy enough to a student of Anglo-American history and contemporary culture, untrained in the law. If he were told that the Eighth Amendment contained a "basic prohibition against inhuman treatment," that its underlying concept was "nothing less than the dignity of man," that the Amendment was designed to assure that the state's punishing power "be exercised within the limits of civilized standards," and that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[20] we submit that he could only conclude the Eighth Amendment forbade court-ordered killings of human beings, long after their apprehension and incarceration, as a punishment for the crime of robbery in Twentieth Century America.

He would come to the same conclusion if he were told, less elegantly, that "the question inherent in the eighth amendment [is] is what the legislature has done, how-

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[19] That prohibition restrains the States by virtue of the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660 (1962).

[20] The quoted passages are all from *Trop* v. *Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion of the Chief Justice).

ever rationally supportable it may be, too offensive to stomach?" [21]

The considerations which would affect the thinking of our hypothetical non-legal scholar are not, of course, legally dispositive, but they are also not legally irrelevant. We enumerate a few of them as a means of framing systematically what we see as the legal nub of this case:

(1) Our scholar would look first at history; and, accustomed to the adage that the lessons of history are never clear, he would be surprised. For the lesson of Anglo-American history is clear beyond all mistaking that the advance of civilization has been marked precisely by the progressive abandonment of the death penalty. Our scholar would examine the course of England from the "bloody code" of the Eighteenth and Nineteenth Centuries to nearly total legal abolition in the mid-Twentieth, and the parallel history of the United States abutting, as we shall see, in virtually total abolition *de facto*.[22] Such an examination could only reinforce his intuitive sense

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[21] Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

[22] Concerning the English experience, see PHILLIPSON, THREE CRIMINAL LAW REFORMERS (1923); RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948); SCOTT, THE HISTORY OF CAPITAL PUNISHMENT (1950); TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961). Final abolition (except for a few obscure crimes for which the death penalty is not in fact used) came on October 28, 1965. See Dawtry, *The Abolition of the Death Penalty in Britain*, 6 BRIT. J. CRIM. 183 (1966).

Concerning the American experience, see BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919); BEDAU, THE DEATH PENALTY IN AMERICA (1964) [hereafter cited as BEDAU], chaps. 1-2; Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124 (1952). The most recent developments—legal abolition in Oregon, Vermont, Iowa, West Virginia, and (with some reservations) New York—are reported in Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY (No. 312) 82 (Aug. 1967).

that society's ceasing to use death as a punishment for crime is—in Albert Camus' phrase—"a great civilizing step." [23] Is this intuition not frankly obvious? Can anyone who thinks about it as a human being—(we postpone for a moment the more subtle task of legal judgment)—doubt the rightness of the same insight recently voiced by the Attorney General of the United States: "Surely the abolition of the death penalty is a major milestone in the long road up from barbarism"? [24]

(2) Our scholar would notice the history of thought as well as the history of events, and would be struck by the conceptions and ideals with which opposition to, and support for, the death penalty have respectively been long associated:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." [25]

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[23] CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH (1961) 173 [hereafter cited as CAMUS], at 232.

[24] Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.

[25] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) 15. This work is hereafter cited as SELLIN (1959).

(This is not to say, of course, that no one does or can support the death penalty for other reasons than belief in retribution, atonement or vengeance; but it is significant that these beliefs have been historically the mainstays of support for the institution of capital punishment, while the movement for abolition has been spearheaded by concerns derived from conceptions of "the dignity of man," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of the Chief Justice).)

(3) A related perception focuses upon the professional identification of those who have traditionally opposed, or supported, capital punishment:

> "In the first place, it will be noticed that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges." (UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 64.[35]

(Again, we postpone for later discussion the complicated question *why* judges, particularly, as distinguished from students of the human sciences and of penology, should

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[35] *Accord: id.*, at 124; BEDAU 122-123; Louis J. West, M.D., "A Psychiatrist Looks at the Death Penalty," Paper Presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 11, 1966 [hereafter cited as *West*], p. 2. And see KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) [hereafter cited as *Koestler*] 21-40.

be numbered strongly among the historical supporters of the death penalty.)

(4) Our suppositious scholar, of course, would also give attention to what is really involved in the execution of a human being. He would have in mind Arthur Koestler's admonition that the question of the cruelty of killing men is not one that gains clarity from being wrapped in abstractions.

> "You could hardly have a nobler example of the true function of words, namely the partial concealment of fundamentals. The phrase 'capital punishment' itself is a less obvious instance—less obvious because we have got so used to it. It means (in England) dislocating a man's neck by tying a six-foot rope around it and suddenly dropping him through a trap door with his arms and legs tied. If his neck happen not to break—it is certain at least to dislocate—then he would strangle, which takes longer and turns his face dark blue. In either case he often defecates, since people usually want to do this when they are frightened, and the huge shock to his nervous system when the rope tightens removes the last vestige of self-control, together with the social need for it.
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> "This is not a nice picture and few of us care to be reminded of it. Many of us can think calmly enough of capital punishment, because the phrase embodies what *The Times* would call 'a decent reticence.' The reticence has been growing decently for about a century, beginning in 1868 with the decision to hang people in private instead of making it a public spectacle." (KOESTLER & ROLPH, HANGED BY THE NECK (1961) 11-12.

Camus makes the point vividly: "The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail." CAMUS 187.

In candor, we must say that this question of presenting the reality of capital punishment to the Court has given us deep concern in the writing of this brief. We would consider it both logically and legally absurd for the Court to deliberate the question whether Edward Boykin's death was a cruel and unusual punishment in terms of such decorous abstractions as "capital punishment" and "the death penalty." For a while we were inclined to append to the brief at the least a few descriptions of the methods of American executions by electrocution and by gas. (Lest the description just given by Koestler be thought wide of the mark, it should be recalled that the Royal Commission in 1953 recommended that England retain hanging as a means of legal execution, because it was more humane and certain than the American methods.[27]) But, as we prepared the materials for the appendix, we realized that their inclusion here would certainly cause us to be charged with sensationalism and an appeal to passion and repulsion. Such is the character of this institution of killing men that it forces one who attacks it legally either to describe with particularity what he is attacking, and be bitterly resented, or to keep silent about it, and risk being misunderstood. Finally, we have decided to join in the general "decent reticence," and to do no more than provide the Court with citations to descriptions of the methods of

[27] ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION] 246-261, particularly at 256.

executions.[28] Our hypothetical scholar would read these materials and he would conclude, with Dr. Louis J. West, that:

> "The killing of a helpless captive is a brutally degrading experience. If only those who have participated in an execution could vote on the death penalty, it would be abolished tomorrow." (*West*, at p. 2.)

(5) This last observation leads naturally to a connected one, the significance of our modern practice of secret executions, and to Justice Bok's trenchant question: "Why is the State so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?" Bok, Star Wormwood (1959) 197. Notwithstanding that virtually the only argument made in support of the death penalty in the Twentieth Century is its efficacy as a general deterrent (an argument which we shall later note is factually unfounded),[29] the men killed for deterrence's sake today are killed clandestinely, out of public

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[28] Duffy & Hirshberg, 88 Men and 2 Women (1962) 68-70, 100-106; Lawes, Life and Death in Sing Sing (1928) 162-190; McGehee & Hildebrand, eds., The Death Penalty (1964) 81-85; Di Salle, The Power of Life and Death (1965) 84-85; Eshelman, Death Row Chaplain (1962) 26-29, 101-104, 159-164; Chessman, Trial by Ordeal (1955) 195-202; Testimony of Clinton T. Duffy, in United States Senate, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Hearings on S. 1760, *To Abolish the Death Penalty* (unprinted Report of Proceedings, March 20, 1968) [hereafter cited as *Hearings*], vol. 1, pp. 34-39.

[29] See note 53 *infra*.

view."[10] Camus' forthright analysis of all that this implies is hardly refutable:

> "As an example and for the sake of security, it would be wiser, instead of hiding the execution, to hold up the severed head in front of all who are shaving in the morning.
>
> "Nothing of the sort happens. The State disguises executions and keeps silent about these statements and eyewitness accounts [describing the death scene]. Hence it doesn't really believe in the exemplary value of the penalty, except by tradition and because it has never bothered to think about the matter. . . . A law is being applied without being thought out and the condemned die in the name of a theory in which the executioners do not believe. If they believed in it, this would be obvious to all. But the publicity not only arouses sadistic instincts with incalculable repercussions eventually leading to another murder; it also runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute men one after another, as is done in our country today, if the executions were translated into vivid images in the popular imagination. . . . This is why

[10] The first American State to abolish public executions was Pennsylvania, in 1834, see Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952), the year in which also Great Britain abolished gibbeting by 4&5 Will. IV, chap. 26, §§ 1, 2. Public execution terminated in England in 1868, see TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961), 20; and such executions were progressively outlawed in the United States throughout the Nineteenth Century, BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919) 6. The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY (3d ed. 1949) 307.

we must approve of the position of Gambetta, who, as an adversary of the death penalty, voted against a bill involving suppression of publicity for executions, declaring: If you suppress the horror of the spectacle, if you execute inside prisons, you will smother the public outburst of revolt that has taken place of late and you will strengthen the death penalty.

"Indeed, one must kill publicly or confess that one does not feel authorized to kill. If society justifies the death penalty by the necessity of the example, it must justify itself by making the publicity necessary. It must show the executioner's hands each time and force everyone to look at them—the over-delicate citizens and all those who had any responsibility in bringing the executioner into being. Otherwise, society admits that it kills without knowing what it is saying or doing. Or else it admits that such revolting ceremonies can only excite crime or completely upset opinion." (CAMUS 186-188.)

The relation between this practice of secret executions and the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles, supra,* 356 U.S. at 101, should be obvious. We hide our executions because we are ashamed to show them, because they make men sick. To jump ahead for a moment to consideration of the matter in constitutional terms, one wonders whether this Court would sustain today a *public* execution as consistent with the Eighth Amendment? We suggest that it would not; that constitutional law as well as public sentiment would condemn such barbarous shows. Does hiding the matter of execution make it any the more consistent with our constitutional and public standards of decency? Our legally untrained scholar would, we think, conclude with Gottlieb that it does not.

"It is of the greatest significance, I suggest, that executions are carried out away from the public eye and that the public spectacle of hangings and beheadings has been left behind to earlier centuries. This is evidence that if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of 'cruelty,' particularly when we contrast this present custom of secrecy with the one-time public display of executions." [21]

(6) Gottlieb speaks of the "decay of the waiting man"; and others too have recognized the torment of the thousand days on death row. The length of time, of course, is not what is alone important here—although it is important.[22] Our hypothetical scholar would only have to imag-

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[21] GERALD H. GOTTLIEB ON CAPITAL PUNISHMENT (Center for the Study of Democratic Institutions 1967) 6, reprinted in 72 CASE & COMMENT (No. 4), 3, 8 (July-Aug., 1967).

[22] "The devastating, degrading fear that is imposed on the condemned man for months or years is a punishment more terrible than death, and one that was not imposed on the victim." CAMUS 200. Compare the comments of Charles Gardner, an inmate of San Quentin's death row, reported in the NEW YORK LAW JOURNAL, November 27, 1968, p. 1, col. 4: "Gardner has been on death row ten months, waiting, hoping that he could escape the gas chamber. 'But rather than stay five to eight years on the row, I'd rather be dead by gas,' Gardner said. 'Waiting for it to come is worse than getting it.'"

Of course, the delay in Gardner's and other cases today is an incident of our protective system of criminal justice, and a necessary incident of the appeals and post-conviction proceedings required by due process. But that makes it none the less tormenting. Surely, our Constitution could not tolerate capital punishment today without due process. The question is whether, with due process and its necessary incidents, the punishment is cruel and unusual within the Eighth Amendment.

ine himself in the position of the condemned man for an hour prior to his execution, in order to appreciate the cruelty, the intolerable inhumanity, of the event that is occurring. Dostoyevski, who was actually in that position, thus described it:

> "But the chief and the worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's *certain*. When you lay your head down under the knife and hear the knife slide over your head, that quarter of a second is the most terrible of all." DOSTOYEVSKY, THE IDIOT (Modern Library, 1935) 20 (original emphasis).

Again, Camus has put the matter in characteristically clear perspective:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incindiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself

a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." (CAMUS 199.)

(7) Finally, our scholar would consider the arguments which are put forward today in support of the death penalty. These rest for the most part upon the proposition that death is the most efficacious deterrent which—if used sufficiently infrequently and within the hiding of prison walls—a non-totalitarian society can stomach.[33] Reading between the lines, he would come to the obvious conclusion of Clarence Darrow: "That capital punishment is horrible and cruel is the reason for its existence." *Darrow, A Comment on Capital Punishment,* in LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1960), xv, xvii. And coming to his own conclusion, on the basis of all that we have said above, our scholar would most firmly disagree that death *is* a punishment which a non-totalitarian society can stomach at all.

Aye, but there's of course the rub. Our hypothetical student of culture is free to reach his own independent con-

[33] See the exhaustive summary in CAPITAL PUNISHMENT: MATERIAL RELATING TO ITS PURPOSE AND VALUE (compiled by Hon. Guy Favreau, Canadian Minister of Justice) (Queen's Printer, Ottawa, 1965) [hereafter cited as FAVREAU] 23-28.

clusions about the death penalty in a manner that would be altogether inappropriate as a principle for decision by this Court construing the Eighth Amendment. For this Court does not sit to make the personal views of its Justices the rule of the Eighth Amendment or the Fourteenth; and, as it has often said, in matters of constitutional adjudication under such broad clauses as Cruel and Unusual Punishment or Due Process, much deference must be given by the Court to legislative judgment. See *Spencer* v. *Texas*, 385 U.S. 554 (1967).

We come, therefore, to what we think lies at the heart of the question whether Edward Boykin's sentence of death is a constitutionally forbidden cruel and unusual punishment. That is a dilemma which is inherent in the Eighth Amendment. It derives from the circumstance that the Amendment plainly is a restriction upon the legislative enactment of cruel penalties, as well as upon the judicial imposition of them. This Court has so held by voiding statutes under the Cruel and Unusual Punishment Clause. *Weems* v. *United States*, 217 U.S. 349 (1910); *Trop* v. *Dulles*, 356 U.S. 86 (1958) (by a plurality); *Robinson* v. *California*, 370 U.S. 660 (1962). And the force of the Clause is not limited to prohibition of punishments that would have turned the stomachs of the Framers in the Eighteenth Century. "The clause of the Constitution . . . may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States, supra*, 217 U.S. at 378; see generally *id.*, 369-373. We repeat the important observation with which *Trop* v. *Dulles* outlawed the hoary penalty of banishment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

But surely there lies the most extraordinary difficulty in a process of constitutional adjudication by which this Court must subject legislation to the test of enlightened public opinion, and must judge the validity of a legislature's product according to society's standards of decency. For, after all, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can —and for the simple reason that the law is on the books of a democratic society. So either the Eighth Amendment is *not* a judicially enforceable restriction upon legislation; or the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—which at first blush may appear to be the question presented by Boykin's attack on Ala. Code, tit. 14, § 415 (1959)—is the wrong question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon inhuman penal legislation rightfully enforceable by this Court. Nor do we believe that the Amendment's prohibition is restricted to drawing and quartering, and similar antiquated butcheries—nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to

be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Edward Boykin comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a law on the books? The question is, rather: will contemporary standards of decency allow the execution of the law's penalty *in fact*? By this we do not mean that the Court is to review the penalty decision of the sentencing judge or jury in particular cases. Our concentration upon the question whether public conscience will support the law's application *in fact* does not mean to draw the distinction between general and specific applications of a penalty. It means to draw the distinction between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a government to put on its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few freak cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general applica-

tion, would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.

Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation which the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity —even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state; and public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a fashion as to keep his numbers small and the horror of his condition mute. Legislators neither must nor do take account of such individuals. But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Edward Boykin. His sentence of death for simple robbery is, we think, a cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for the crime of robbery if such a penalty were uniformly, regularly, and even-handedly applied either to all robbers or to any non-arbitrarily selected sub-class of robbers.

One may take any rational standard one wishes for selection among the perpetrators of the crime of simple robbery, apply it fairly, and imagine the execution of all the robbers who fall within the class. Since there were 202,053 robberies known to the police in the United States last year,[24] we assume that our rational selection standard would net us at least a hundred robbers for the year—say, exactly one hundred. Imagine, now, their electrocutions and gassings in a single year. The number we have hit upon proves to be, as we shall see, four times the number of robbers actually executed in the United States during the thirty-eight years between 1930 and 1967. It is twelve and a half times the number of robbers actually executed in the eighteen years between 1950 and 1967. If these one hundred robbers were actually executed in the year 1968, we submit it is palpable that the public conscience of this Nation would be profoundly and fundamentally revolted, and that the death penalty for robbery would be abolished overnight for the atavistic horror that it is. Our reasons for this submission follow. First we pause for one additional paragraph to make our legal point clear.

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[24] UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (CRIME IN THE UNITED STATES), 1967 (released August 27, 1968), p. 60.

We disagree not with the reasoning process, but rather with the factual premise, of a statement made by this Court ten years ago in *Trop* v. *Dulles*, *supra*, 356 U.S., at 99:

> "Whatever the arguments may be against capital punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." (Emphasis added.)

We think that today it is simply not correct that the death penalty is "still widely accepted." [35] We speak, for the reasons which we have just stated in detail, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted," the death penalty today is with rare public unanimity rejected and repudiated—particularly for such crimes as robbery. We proceed next to demonstrate this point and to develop its constitutional implications.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic. See UNITED NATIONS 81-82, 96-97; SELLIN (1959) 4-14; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK] 5-6; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT (1967) 239-240; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 9-11 (1964). There are probably fewer legal executions per year

[35] Apart from this observation in *Trop*, no decision of the Court stands in the way of holding Boykin's death sentence invalid under the Eighth Amendment. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878),

in the entire world today than the number estimated to have occurred each year in London and Middlesex County alone during the reign of Edward VI. See Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965) [hereafter cited as *Patrick*]. Although Patrick reports more than one hundred capital crimes on the statute books of 107 different nations, *id.*, at 406-407, "nearly all of the crimes which result in actual execution are murder in some form, whether assassination, premeditated murder or felony murder. In fact, of the 1,033 reported executions [for the period 1961-1965], some 929 appear to have been for murder." UNITED NATIONS 97.

In the United States, the decreasing trend of executions has been especially dramatic. The National Crime Commission recently noted that:

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize

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and *In re Kemmler*, 136 U.S. 436 (1890), do state, respectively, that shooting and electrocution as forms of execution are not cruel and unusual. The statements in both cases are dicta: no Eighth Amendment point was presented in *Wilkerson*, and the Eighth Amendment issue was put out of the case in *Kemmler* by the now obsolete holding that the Eighth Amendment did not apply to the States. In both cases, the Court's attention was focused upon the manner, not the propriety, of inflicting death; the latter question appears not to have been considered by the parties or the Justices. And, finally, the cases are three quarters of a century old, while the Eighth Amendment is, as the Court said in *Weems* v. *United States*, 217 U.S. 349, 378 (1910), "progressive."

McElvaine v. *Brush*, 142 U.S. 155 (1891), and *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), also were concerned with particular incidents of the death penalty, not its essential permissibility under the Eighth Amendment. The former case involved a challenge to solitary confinement prior to execution; the latter, a challenge to re-execution after the first attempt to kill Francis failed.

the carrying out of a death sentence." (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143.)

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, *Executions 1930-1967* (June 1968) [hereafter cited as NPS (1968)], p. 7. Of these 3,859, only 191 were executed between 1960 and 1967; only 25 during the years 1964-1967. *Ibid.* The trend is shown quite adequately by setting out the figures for the number of executions during each of the following representative years:

Total Number of Executions in the United States

1930	—	155
1935	—	199
1940	—	124
1945	—	117
1950	—	82
1955	—	76
1960	—	56
1961	—	42
1962	—	47
1963	—	21
1964	—	15
1965	—	7
1966	—	1
1967	—	2

During the calendar year 1968, there will be no executions in the United States.

It is interesting to note the geographic distribution of the executions. (We shall return later to the racial figures.) Of the 3,859 persons killed since 1930, 33 were executed by the federal government; 608 by nine northeastern States; 403 by twelve north-central States; 506 by thirteen western States; and 2,306 by sixteen southern States and the District of Columbia. Since 1960, the corresponding figures for 191 executions are as follows: federal—1; northeastern States—17; north-central States—21; western States—48; southern States and D.C.—104. NPS (1968), pp. 8-9. As of December 31, 1967, there were 435 men on death row throughout the entire country. Two of these were federal prisoners; 62 were in the northeastern States; 55 were in the north-central States; 91 were in the western States; and 225 were in the southern States and D.C. *Id.*, pp. 22-23.

Of the 3,859 persons executed between 1930 and 1967, 3,334 died for the crime of murder, 455 for the crime of rape, and only 70 for other crimes. *Id.*, p. 7. Twenty-five of these seventy died for robbery-like crimes, usually aggravated forms of robbery. *Id.*, pp. 10-11 [35]. Two of the 25 were executed by the federal government; the remaining 23, by six southern States. *Ibid.* Alabama has executed five men for robbery since 1930. *Ibid.*

There have been only two executions for robbery-like crimes in the United States since 1960: one in that year,

[35] The figure given at *id.*, p. 7, n. (a), "23," is incorrect. Concerning the robbery-like crimes for which death may be inflicted in the United States today, see note 54 *infra*.

and one in 1962.[37] Of 85 men *sentenced* to death in 1967, only one received that sentence for a robbery-like crime. NPS (1968), p. 13. Of the 435 men on death row as of December 31, 1967, only four were there for robbery-like crimes. *Ibid.* These four came from two southern States: Alabama and Texas. *Id.*, pp. 22-23.

(2) We summarize our conclusions from the available data as follows: Actual use of the death penalty throughout the world is on the decline; and, in the United States, precipitously on the decline. In this country, sentences of death and executions are predominately a southern phenomenon. Sentences of death and executions for other crimes than murder are virtually exclusively a southern phenomenon.[38] Since 1960, at the least, executions in the United States for any crime have been rare. During the last few years they have been freakishly rare. Executions for robbery-like crimes in the United States have been freakishly rare since 1930. In the nine years from and including 1960 until today, there were two of them. At the last reported count, four men in the Nation were on death row for crimes in the nature of robbery: Edward Boykin and three others. Boykin alone was on the row for simple robbery.[39]

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[37] These two executions are reflected in BEDAU 96, 108. That there have been no others since 1960 is established by examination of the yearly National Prisoner Statistics Bulletins on Executions since that year.

[38] Of 525 persons executed between 1930 and 1967 for crime other than murder, 482 were executed in sixteen southern States and the District of Columbia. NPS (1968), pp. 10-11. Of 78 persons on death row as of December 31, 1967 for crimes other than murder, 69 were in the same sixteen southern States. *Id.*, pp. 22-23.

[39] The three others were on death row in Texas, which has not punished simple robbery capitally in this Century.

(3) But what do these almost incredible rarities in the use of capital punishment imply for the constitutional question before the Court? In the first place, they obviously imply—in the language of *Trop* v. *Dulles*, *supra*—that capital punishment is *not* "still widely accepted" in contemporary America. Recently, this Court cited public opinion polls indicating that less than half of the American people believe in the death penalty. *Witherspoon* v. *Illinois*, 391 U.S. 510, 519-520 (1968). The value of such polls is very slight as a gauge of the standards of decency to which the Eighth Amendment bids this Court look. This is so because opinions tapped in this fashion are notoriously fickle;[40] and also because the citizen who deals with a poll-taker—like the legislator who puts or maintains a capital statute on the books[41]—can have his cake and eat it too. He can afford to approve the principle of killing because in practice the persons selected to die will be so few as to go unnoticed. The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does*. What it has done, in the years 1966-1968 is to execute three people—none for robbery.

Of course, stays of execution and state and federal post-conviction proceedings on behalf of condemned men affect these figures, but not very much. At the end of 1967, there were only 435 men on death row, notwithstanding the near cessation of executions since 1964. At the same date, there were only four men on death row for robbery-like crimes, notwithstanding America has executed no one for such a

[40] "If the last victim happens to arouse pity—a feeble-minded boy for instance, unhinged by the movies, or a mother of two children, half-crazed by gin and jealousy—up go the 'nays' of mercy like a flight of doves; if he is a cool customer like Christie, up go the 'ayes' like a swarm of vultures." KOESTLER 163.

[41] See pp. 38-40 *supra*.

crime since 1962. Plainly, the processes of American justice through which the conscience of a people may be glimpsed are sending very, very few men onto death row, and taking most of them off again before execution day. What American acceptance of the death penalty now boils down to is that America can stomach a few legal killings a year.

(4) One may look at these figures from another direction as well. No one knows or can estimate accurately how many convictions of capital crimes are returned in the United States yearly. But we do know that thirty-nine States, the District of Columbia, and the federal jurisdiction all retain on their books statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes may be so punishable. (Appendix A to this brief sets out the penal provisions of the several States carrying the death penalty.) Yet, with all this capital armament in the arsenal of a Nation of enormous and burgeoning population, with a growing crime rate and a going crime scare, only a few, rare men are sentenced to death and fewer executed. This phenomenon reflects, we suggest, an overwhelming national repulsion against the penalty of death. Such a repulsion is all the more striking when one takes into account: (a) that for the past several years the country has undergone one of the most intense of its recurring periods of public agitation about and fear of crime; (b) that for a number of years there have been so few executions as to provide almost no focus for the mobilization of public sentiments *against* the death penalty;[42] (c) that during these years, and many more before them, American executions have been conducted in secret, their most horrible aspects carefully concealed from public view; (d) that the death penalty is sponsored by the State (in

[42] See BEDAU 23.

most jurisdictions), publicly approved by State officials,[42] and supported by claims prevalent in law-enforcement quarters[43] (although quite without basis in fact[44]) that the penalty has unique penological values, particularly as a deterrent. It strongly appears, we think, that even under the most favorable conditions for capital punishment—with the vices of the death penalty concealed and its virtues inaccurately extolled—the American conscience has repudiated it hands down.

(5) Of course, the penalty remains on the statute books. But is it not obvious, as Warden Lawes observed long ago, that it does so only *because* of the rarity with which it is applied in fact?

> "'What would be the attitude of the American people if by good or ill circumstance the ten thousand men and women who in any one year commit our murders and manslaughters in these United States, would all be convicted of murder, sentenced to death, and that punishment actually inflicted?' What, indeed, but an almost universal cry for abolition?" (LAWES, TWENTY THOUSAND YEARS IN SING SING (1932) 306-307.)

It is, certainly, a matter of history that public acceptability of the death penalty has been maintained only by giving up its mandatory form and enacting statutes allowing jury or

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[42] "The primary support today for the death penalty comes from law enforcement groups, that is, from the police and from prosecutors." BEDAU 120. See also note 53, para. (3), *infra*.

[43] J. Edgar Hoover's several releases on the subject of the death penalty are widely publicized examples of these claims. They are reprinted from the F.B.I. Law Enforcement Bulletin and the Uniform Crime Reports in BEDAU 130.

[44] See note 58 *infra*.

court discretion in capital sentencing.[46] The discretion given by these statutes is wholly arbitrary, as we shall see in Part III, *infra*, of this brief. And the evidence is overwhelming that the discretion has been used arbitrarily.[47] Whatever acceptability the death penalty may have today, then, appears to be purchased by both legal and practical concessions to arbitrariness.

(6) We have already sketched, at pp. 38-40 *supra*, the general reasons why we believe that a legislated penalty cannot survive Eighth Amendment scrutiny if its acceptability to public conscience rests on such concessions. We shall develop the point further below, with specific reference to the death penalty, after we state here the reasons for our assertion that the penalty is in fact arbitrarily applied.

The very rarity of death sentences and executions, certainly, gives rise to a strong inference of arbitrariness, since it is virtually impossible to conceive non-arbitrary standards by which the very few men chosen to die in America should have been singled out from the enormous class of their death-eligible peers. That inference is heightened by the fact that the selective judgments made at the three most critical stages of a capital proceeding—the prosecutor's decision whether to seek the death penalty, the jury's decision whether to impose it, and the governor's

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[46] There are very few crimes in the United States today which carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several States; perjury in a capital case, etc.) See BEDAU 48-52. And see Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). Outside the United States, also, mandatory capital punishment is rapidly being replaced by grants of discretion. UNITED NATIONS 13, 82, 87.

[47] See the succeeding paragraph.

decision whether to commute it—are all made without the slightest pretense of standards or guidelines. Indeed, the entire course of a capital proceeding is attended by procedures, common to virtually all American jurisdictions, that tend to make its rational disposition incomparably difficult. See note 6 *supra*.

The result is what one might suspect.

> "Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten. . . . Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die, makes capital punishment a ghastly, brainless lottery." (*West*, p. 2.)

One may identify several dimensions of arbitrariness here. *First*, there is the simple matter of fluke—of baseless, random choice in the matter of life or death.

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row." (Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.)

Accord: Lawes, Twenty Thousand Years in Sing Sing (1932) 302, 307-310; Duffy & Hutchins, 23 Min and 2

WOLFGANG (1962) 254-255; Testimony of Clinton T. Duffy, in *Hearings*, vol. 1, pp. 44-44A." And see BEDAU 410-413.

Second, "the death penalty . . . almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAlister, former Catholic chaplain at San Quentin, points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offender." DUFFY & HIRSHBERG, *op. cit. supra*, 256-257. See the testimony of former Governor Michael Di Salle, in *Hearings*, vol. 1, pp. 14-16; see also note 8, *supra*.

Third, there is persuasive evidence of racial discrimination in the selection of the men who will die. This is generally difficult or impossible to prove in judicially cognizable ways. But it is strongly suggested by the *National Prisoner Statistics*;[48] it has been borne out in a number of discrete

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[48] "I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta Prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes more so, than most of those men on the row."

[49] The following are the total number of persons executed between 1930 and 1967 (3,859), broken down by offense and race, as they appear in NPS (1968), p. 7:

	Murder	Rape	Other	Total
White	1664 (49.9%)	48 (10.6%)	39 (55.7%)	1751 (45.4%)
Negro	1630 (48.9%)	405 (89.0%)	31 (44.3%)	2066 (53.1%)
Other	40 (1.2%)	2 (0.4%)	0 (0.0%)	42 (1.1%)
Total	3334 (100%)	455 (100%)	70 (100%)	3859 (100%)

Between 1930 and 1967, there were 35 executions in the United States for robbery-like crimes. The federal government executed two white men; Kentucky executed three; and Oklahoma, one. Nineteen Negroes were executed for these crimes: six in Georgia;

and limited, but carefully done studies,[50] and it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country.[51]

In 1965, *amicus* Legal Defense Fund determined to make a more refined and systematic study of the question of racial discrimination in capital sentencing than had theretofore been attempted. It requested Dr. Marvin E. Wolfgang, Chairman of the Department of Sociology at the University of Pennsylvania, one of the country's most eminent criminologists, to conduct an investigation of the influence of race upon sentencing for the crime of rape in those States where rape is punishable by death. Dr. Wolf-

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five in Alabama; three in Mississippi; three in Texas, and two in Kentucky. *Id.*, pp. 10-11.

The following is the breakdown of the 435 men reported under sentence of death in the country as of December 31, 1967 (*id.*, pp. 22-23):

	White	Negro	Other	Total
Nine northeastern States	29	33	0	62
Twelve north-central States	31	24	0	55
Thirteen western States	68	21	2	91
Sixteen southern States	66	159	0	225
Federal	1	1	0	2
Total	195	238	2	435

[50] Johnson, *The Negro and Crime*, 271 ANNALS 93 (1941); Garfinkel, *Research Notes on Inter- and Intra-Racial Homicides*, 26 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964).

[51] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; UNITED NATIONS 32, 36; BEDAU 411-413; MERRIAM 5, 17; HARTUNG, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967).

gang's research covered eleven States during a period of twenty years, 1945-1965. His findings with respect to the State of Arkansas are presently before this Court in the Petition for Certiorari, in *Maxwell* v. *Bishop*, O.T. 1968, No. 622. To summarize them, Dr. Wolfgang found a twenty-year pattern of racially differential sentencing pursuant to which Negro defendants convicted of rape—and particularly Negro defendants convicted of the rape of white complainants—were disproportionately frequently sentenced to die. Exhaustive efforts to explain the sentencing differentials on other grounds than race failed; Dr. Wolfgang concluded that, in Arkansas, Negroes had been discriminatorily sentenced to death for rape on account of race.

Dr. Wolfgang's findings for the other States he studied are neither of record here nor in judicially noticeable form, so we pretermit discussion of them. Based upon his testimony relating to Arkansas, the Court of Appeals for the Eighth Circuit admitted that there were "recognizable indicators" that "the death penalty for rape may have been discriminatorily applied over the decades, in that large area of states whose statutes provide for it," *Maxwell* v. *Bishop*, 398 F.2d 138, 148 (1968). The study provides grounds for "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time." *Id.*, at 147. These conclusions are sufficient for our present purposes.

(7) Of course, what is true for Arkansas or for the South as a whole may not be true for Alabama, and what is true for rape may not be true for robbery. The execution figures do show a remarkable similarity in the racial breakdown of men put to death in sixteen southern States as a group and in Arkansas and Alabama, and for rape and for robbery.

Executions in the South, 1930-1967[a]

	Rape		Robbery		Murder		Other		Total	
	White	Negro	White	Negro	White	Negro	White	Negro	White	Negro
Sixteen Southern States	48	398	4	19	585	1,231	5	11	637	1,659
Alabama	2	20	0	5	26	80	0	2	28	107
Arkansas	2	17	0	0	25	73	0	0	27	90

Also, the procedure by which the life-death sentencing choice is principally made, unfettered jury discretion, is the same throughout the South and in Arkansas and Alabama, for both rape and robbery. From these circumstances, one might infer that if the opportunity it gives for racial discrimination is being seized upon in rape cases throughout the South, it is also seized upon in robbery cases in Alabama. But we are quick to admit that this is inference; and that in Boykin's case, unlike the case of a Southern Negro sentenced to die for rape, strict scientific proof of racial discrimination is hard to come by.

The reason for this is not that there is no discrimination, but that—as the figures in the chart above reveal—the total number of persons sentenced to death for robbery in any State (or even in all the States) is likely too small for reliable statistical analysis. Obviously, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often. By being arbitrary in selecting the victims of discrimination, a State can get away with both arbitrariness and discrimination. Or, to put the matter another way, if a State invokes a particular penalty sufficiently rarely so that no regular pattern of its use develops, the State *must* be acting arbitrarily; it *may* be acting discriminatorily; it *likely will* be

[a] NPS (1968), pp. 10-11.

acting in a fashion such that the penalty falls most harshly on the poor and disadvantaged; but it *surely will* be acting in a way that escapes the safeguards of the Constitution, unless the Eighth Amendment forbids. Equal Protection and Due Process provide no judicially usable devices to protect the individual from the arbitrariness of the freakishly rare, harsh penalty. This is all the more reason, we believe, for application of the constitutional guarantee against cruel and unusual punishments.

(8) But there are other consequences, as well, of the freakishly rare use of a harsh criminal penalty. We have pointed out above that such use escapes not only meaningful control under the constitutional guarantees of Equal Protection and Due Process; it escapes also the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. A public can easily bear the rare, random occurrence of a punishment which, if applied regularly, would make the common gorge rise. It seems to us that this is just the kind of penalty at which a prohibition of cruel and unusual punishments must aim.

The unusual character of the death penalty for robbery permits public and political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment. Rare and arbitrary usage which evades the public conscience politically demands the supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. This is the more true because, we think, rare and arbitrary usage itself affronts "the dignity of man," *Trop* v. *Dulles*, *supra*, and those cherished principles of fair and regular, non-arbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes.

The coupling of "cruel" with "unusual" punishments is no logical accident within the Amendment. When harsh penalties are used unusually, they inevitably become arbitrary; and arbitrary use of harsh punishments is cruel. What would this Court say, under the Eighth Amendment, of an Alabama statute that condemned convicted robbers to play Russian roulette with a thousand-chambered revolver, or to draw long straws for electrocution, one in every thousand to die? In actuality, of course, this is precisely what Alabama *has* done, and Edward Boykin has drawn the long straw.

(9) It is also important, we think, that the rare, unusual, arbitrary use of a harsh penalty operates to deprive it of any functional place in the rational scheme of a state's penal law. Punishment used in this manner ceases to be an instrument of public justice or of reasoned penal policy, and hence it ceases to have any claim to legitimacy that might be set off against the commands of the Eighth Amendment. As it is, capital punishment generally can be shown to have no particular efficacy, in achieving the legitimate aims of criminal law, that less harsh penalties do not have.[13] If it has any such efficacy with regard to

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[13] The legitimate aims of the criminal law are (1) moral reinforcement or reprobation, (2) isolation, reformation, rehabilitation of the offender, and (3) deterrence. "Modern penological thought discounts retribution in the sense of vengeance." ROYAL COMMISSION 17. *Accord: Williams* v. *New York*, 337 U.S. 241, 248 (1949); *Morrissette* v. *United States*, 342 U.S. 246, 251 (1952); *People* v. *Love*, 53 Cal.2d 843, 856-857 n.3, 350 P.2d 705, 713 n.3 (1960); *People* v. *Oliver*, 1 N.Y.2d 152, ——, 151 N.Y.S.2d 367, 373, 134 N.E.2d 197, 201-202 (1956). So also must the Eighth Amendment discount retribution in the sense of vengeance; for the propriety of vengeance, if recognized, would authorize all cruel and unusual punishments.

(1) Moral reinforcement or reprobation doubtless requires that the most serious crimes be punished most seriously. But, obviously,

the crime of simple robbery, Alabama alone among the

"Grading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." BEDAU 268. The reprobation function, therefore, hardly needs or warrants capital punishment. See Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT (1967) 3, 16-17, 19.

(2) "[R]eformation . . . can have no application where the death penalty is exacted." ROYAL COMMISSION 18. As for isolation, the evidence is clear and overwhelming that, for no class of criminals, is death required to render them socially safe. Lesser alternatives are ample. SELLIN (1959) 69-79; KOESTLER 144-152; BEDAU 395-405; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

This, notably, is the dimension in which Twentieth Century society differs radically from the society of two hundred or even a hundred years ago. In earlier times, imprisonment was not a safe, humane or economically feasible alternative to capital punishment. See 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948) 31-33; Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232 (1968). Today it is. The conclusion has been drawn by the Attorney General in these words: "There was a time when self-preservation necessitated [the] . . . imposition [of the death penalty]. Later inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse." Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.

(3) As for deterrence, there is simply no evidence—despite the most exhaustive inquiry into the subject—that the death penalty is a superior deterrent to lesser punishments. See SELLIN (1959) 19-63; SELLIN, CAPITAL PUNISHMENT (1967) 135-186, 244-253; MATTICK 8-28; KOESTLER 48-61, 171-178; CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (3d ed. 1928) 51-90; BEDAU 214, 258-343; Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Hook, *The Death Sentence*, in BEDAU 146, 147-148, 151. A few law enforcement officials and others who support the death penalty sometimes appear to argue that this proposition is factually debatable. It is not, as more candid proponents of capital punishment admit. "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exist show no correlation be-

States has perceived this virtue."[4] But we may put aside

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tween the existence of capital punishment and lower rates of capital crime." UNITED NATIONS 123. Every serious inquiry into the death penalty has accepted this conclusion. UNITED NATIONS 55-58, 115-119; ROYAL COMMISSION 18-24, 58-59, 328-380; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143; NEW YORK STATE, TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT (1965) 2; PENNSYLVANIA JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 9, 20-29; FAVREAU 36-37; and see the debates collected in SELLIN, CAPITAL PUNISHMENT (1967) 55-104, and in FAVREAU, *passim*.

Significantly, wherever serious official inquiries have found some support for the thesis that capital punishment may have greater deterrent efficacy than imprisonment, that support has been found in the impressionistic opinions of police, prosecutors and other law enforcement officials, unsustained by objective evidence. See CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, REPORT (1956) paras. 29-33, 43-52; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964) 8-10; FAVREAU 4, 23. The Royal Commission also gave some weight to such impressionistic opinions, while explicitly recognizing that there was no objective evidence behind them. ROYAL COMMISSION 18-24. Interestingly, corrections personnel appear very preponderately to believe that capital punishment has no particular deterrent efficacy. DUFFY & HIRSCHBERG, 88 MEN AND 2 WOMEN (1962) 257; Testimony of Clinton T. Duffy, in *Hearings*, vol. 1, pp. 42-45; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242.

[4] There are nine States which presently provide the death penalty as the maximum punishment for some form of robbery. Only Alabama provides death as the maximum punishment for simple robbery. Ala. Code, tit. 14, §415 (1959). The other eight States utilize capital punishment for forms of aggravated robbery. Ga. Code Ann. §26-2502 (Supp. 1967) (by force or with offensive weapon); Ky. Rev. Stat. Ann. §433.140 (Supp. 1966) (armed); Miss. Code Ann. §2367 (1957) (with deadly weapon); Mo. Ann. Stat. §§560.120, 560.135 (1953) (with deadly weapon); Okla. Stat. Ann. tit. 21, §801 (1958) (with dangerous weapon); Tenn. Code Ann. 39-3901 (Supp. 1968) (with deadly weapon); Tex. Pen. Code art. 1408 (1948) (with deadly weapon); Va. Code Ann. §18.1-91 (1960) (by force or with deadly weapon); see also §18.1-90 (armed bank robbery). As a result of a revision of its penal code this year, Georgia will cease to punish aggravated

the broader question whether—if regularly, fairly, even-handedly and non-arbitrarily applied—capital punishment

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robbery with the death penalty as of July 1, 1969. Ga. Code Ann. §26-1901 (1968).

(Perhaps it should be noted, for the sake of completeness, that Kentucky makes capital the offense of assault with intent to rob while armed with a deadly weapon, Ky. Rev. Stat. §433.150 (Supp. 1966); while in several other states, train robbery is capital, see BEDAU 44.)

There are sixteen states which punish simple robbery with a maximum term of ten years or less. Conn. Gen. Stat. Ann. §53-67 (1960); Iowa Code Ann. §711.3 (1950); Kan. Gen. Stat. Ann. §§21-528, -529 (1964); Ky. Rev. Stat. §433.120 (1962); La. Rev. Stat., tit. 14, §65 (1951); Md. Ann. Code, art. 27, §486 (1957); Minn. Stat. Ann. §609.24 (1964); N.M. Gen. Stat. §§40A-16-2, 40A-29-3; N.Y. Pen. Law §§160.05, 70.00 (1967); N.C. Gen. Stat. §14-2 (1953) (see *State* v. *Stewart*, 255 N.C. 571, 122 S.E.2d 355 (1961)); Okla. Stat. Ann., tit. 21, §§797, 799 (1958); Pa. Stat. Ann., tit. 18, §4704 (1963); S.C. Code Ann. §§16-11, 17-552 (1962) (see *Dukes* v. *State*, 248 S.C. 227, 149 S.E.2d 598 (1966); Vt. Stat. Ann., tit. 13, §603 (1958); Va. Code Ann. §18.1-91 (1960); Wis. Stat. Ann. §943.32 (1958).

There are fourteen states and three federal territories which provide a maximum term of between ten and twenty years for simple robbery. Alaska Stat. §11.15.240 (1962); C.Z. Code, tit. 6, §2361 (1963); Colo. Rev. Stat. Ann. §40-5-1 (Supp. 1967); D.C. Code Ann. §22-2901 (1967); Ga. Code Ann. §26-2502 (Supp. 1967) (also Ga. Code Ann. §26-1901 (1968)); Hawaii Rev. Laws §§306-8-11 (1955); Ill. Ann. Stat., ch. 38, §18-1 (Smith-Hurd 1964); Mich. Comp. Laws Ann. §750.529 (1968); Miss. Code Ann. §2364 (1957); Nev. Rev. Stat. §200.380 (1967); N.J. Rev. Stat. §2A:141-1 (1937); Ore. Rev. Stat. §163.290 (1967); P.R. Laws Ann., tit. 33, §§851, 853 (1956); S.D. Code §§13.2601-03 (1939); Tenn. Code Ann. §39-3901 (Supp. 1968); W. Va. Code Ann. §61-2-12 (1966); Wyo. Stat. Ann. §6-65 (1959).

There are six states which punish simple robbery with a maximum term of more than twenty years. Ark. Stat. Ann. §41-3602 (1964); Del. Code Ann., tit. 11, §811 (1953); Ind. Ann. Stat. §10-4101 (1956); Neb. Rev. Stat. §28-414 (1943); N.H. Rev. Stat. Ann. §585:18 (1955); Ohio Rev. Code Ann. §2901.12 (1954).

There are also thirteen states which provide a maximum penalty of life imprisonment for simple robbery. Ariz. Rev. Stat. Ann. §13-643 (Supp. 1967); Cal. Pen. Code §§211a, 213 (West 1955); Fla. Stat. §813.011 (1965); Idaho Code Ann. §18-6503 (1949); Me. Rev. Stat. Ann., tit. 17, §3401 (1964) (any term of years);

for robbery would serve some valid function that the State of Alabama is constitutionally free to pursue. Used as

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Mass. Gen. Laws Ann., ch. 265, §19 (1959); Mo. Ann. Stat. §560.135 (1953); Mont. Rev. Code Ann. §94-4303 (1949); N.D. Cent. Code §§12-31-07 to -09 (1960); R.I. Gen. Laws Ann. §11-39-1 (1956); Texas Pen. Code, art. 1408 (1948); Utah Code Ann. §§76-51-1-2 (1953); Wash. Rev. Code Ann. §9.75.010 (1961).

There are twenty-seven States which punish aggravated robbery with higher maximum penalties than they do simple robbery. As noted above, eight States provide the death penalty as the maximum punishment for aggravated robbery. Of the remaining twenty-one States, eight punish aggravated robbery with a maximum punishment of life imprisonment. Colo. Rev. Stat. Ann. §40-5-1 (Supp. 1967) (armed with intent, if resisted, to kill or injure; wounds or threatens injury with weapon; with armed confederate; robbery of bus driver); Hawaii Rev. Laws §§ 306-8-11 (1955) (armed with intent to kill or wound, if resisted; or does wound, strike, or severely injure); Ill. Ann. Stat., ch. 38, §18-2 (Smith-Hurd 1964) (armed); Ind. Ann. Stat. §10-4101 (1956) (with injury); La. Rev. Stat., tit. 14, §64 (Supp. 1967) (armed: 1-99 years); Mich. Comp. Laws Ann. §750.529 (1968) (armed; aggravated assault; serious injury); Ore. Rev. Stat. §163.280 (1967) (armed); W. Va. Code Ann. §61-2-12 (1966) (by strangulation, beating, or violence to person; by threat of deadly weapon).

The remaining twelve states provide for maximum punishments for aggravated robbery of terms from twenty to fifty years. Iowa Code Ann. §711.2 (1950) (25 years: armed with intent to maim if resisted or confederate so armed; strikes victim); Kan. Gen. Stat. Ann. §21-527 (1964) (21 years maximum: by violence or fear of immediate injury); Md. Ann. Code, art. 27, §488 (1957) (20 years maximum: armed); Minn. Stat. Ann. §609.245 (1964) (20 years maximum: armed; injures victim); N.M. Gen. Stat. §§40A-16-2, 40A-29-3 (50 years maximum: armed); N.Y. Pen. Law §§160.15, 70.00 (1967) (25 years maximum: serious injury; armed; uses or threatens with weapon); N.C. Gen. Stat. §14-87 (1953) (30 years maximum: armed); Pa. Stat. Ann., tit. 18, §4705 (20 years maximum: armed or with accomplice; by violence); S.C. Code Ann. §16-333 (Supp. 1967) (25 years maximum: armed with deadly weapon); Vt. Stat. Ann., tit. 13, §603 (20 years maximum: with armed assault); Wisc. Stat. Ann. §943.32 (1958) (30 years maximum: armed with dangerous weapon); Wyo. Stat. Ann. §6-66 (1959) (50 years maximum: with deadly weapon).

The status of capital punishment generally in the United States is described in Appendix A to this brief. See also Bedau 39-52;

Alabama has used it—*irregularly, unfairly, unevenly* and arbitrarily—to execute *five* men in *thirty-nine* years, capital punishment for robbery palpably has no such valid function."[55]

(10) We must conclude, then, that the death penalty for robbery imposed by Alabama upon Edward Boykin is no part of the regular criminal-law machinery of the State. It is a freakish aberration, a rare, extreme act of violence, visibly arbitrary, probably racially discriminatory—a penalty reserved for wholly arbitrary application because, if it were regularly used against robbers, it would affront universally shared standards of public decency. Such a penalty—not Law, but Terror—is the instrument of totalitarian government. It is a cruel and unusual punishment, forbidden by the Eighth Amendment.

NPS (1968), pp. 30-32; 108 CONG. REC. 3300-3305, 87th Cong., 2d Sess. (March 1, 1962).

It appears that, outside of the United States also, capital punishment for robbery is seldom legally available. In 128 nations surveyed, Patrick found that 18 had laws punishing some form of robbery (usually an aggravated form) capitally. *Patrick* 398-404, 409. This is a somewhat larger number than reported in UNITED NATIONS 41.

[55] This is a characteristic of cruel and unusual punishments. "[W]henever social progress outpaces the Law, so that its penalties appear disproportionately severe to the public conscience, juries become reluctant to convict [or to impose the penalty], and reprieves, instead of being an exceptional act of mercy, become virtually the rule, so that only a small proportion of the sentences are actually carried out and the threat accordingly loses its deterrent effect." KOESTLER 86. See BEDAU 31, 33, 270; MATTICK 16.

III.

The Alabama Procedure Under Which Boykin Was Sentenced to Die in the Unregulated, Lawless Discretion of the Jury Violates the Rule of Law Basic to Due Process.

We noted in Part II of this brief that the principal legal device by which Alabama (like most States) permits the arbitrary administration of capital punishment is unrestricted jury discretion. Our present submission attacks the constitutionality of the device. The discretion given Alabama jurors to sentence men whom they convict of robbery to live or die is absolute. It is totally unguided, unprincipled, unconstrained, uncontrolled, and unreviewable. We invite the Court's attention, once again, to the fashion in which the decision to take Edward Boykin's life was submitted to the jury. Pp. 13-14, *supra*. The trial judge simply gave the jurors two forms—a form for life and a form for death—and told them: "You can use either one form or the other when you arrive at your verdict." App. 32.

We think there can be no doubt about the unconstitutionality of such a procedure. We have made the argument to the Court before,[46] and we urge it again here. Just last month, it was rejected by the Supreme Court of California by a four-to-three vote. The California opinions are attached as Appendix B hereto. With deference, we submit that Justice Tobriner's dissenting opinion, in which Chief Justice Traynor and Justice Peters concur, states the law of the Fourteenth Amendment. It does so with uncomparable lucidity, and we hope that it will be read by this Court.

[46] See the documents cited in note 7, para. (2), *supra*.

The issues to which it speaks could not be more important or more fundamental. For, whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned the sort of vagueness in criminal statutes that "licenses the jury to create its own standard in each case," *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See *e.g.*, *Smith* v. *Cahoon*, 283 U.S. 552 (1931); *Cline* v. *Frink Dairy Co.*, 247 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and the influence of impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 110; Note, 109 U. Pa. L. Rev. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

Under these decisions, it could scarcely be contended that an Alabama statute would be valid which provided: "whoever is found condemnable in the discretion of a jury shall be guilty of an offense." Yet we submit that this suppositious statute stands no differently in light of the concerns of the Due Process Clause than the unregulated sentencing practice under which petitioner was condemned to die. The statute, it is true, deals with crime, and Alabama's sentenc-

ing practice with punishment. But a practice that jeopardizes the integrity and reliability of the sentencing process is as unconstitutional as one that similarly affects the guilt-determining process. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *McConnell* v. *Rhay* and *Stiltner* v. *Rhay*, 37 U.S. L. Week 3131 (U.S., Oct. 14, 1968). In *Witherspoon*, 391 U.S. at 521 n. 20, this Court noted that while sentencing choice—and, in particular, the choice of life or death may be:

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Traditionally, of course, it may have been thought that "fair notice" questions were raised by regulations defining offenses but not by those prescribing punishment. Yet, is it not apparent that the vice of the "whoever-is-found-condemnable" statute has little to do with notice? The statute is bad not because a man does not know how to behave consistently with it, but because, *however he behaves, he may be arbitrarily and capriciously taken by the heels.* The precise vice inheres in unregulated jury discretion to sentence a convicted robber to life or death. He too may be dealt with arbitrarily, his life extinguished for any reason or none. Surely he is, at the same time, under Alabama's single verdict practice, found guilty of a defined crime. That conviction, however, cannot constitutionally be given the effect of stripping him of every civil right, including the fundamental right to due process of law. E.g., *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966), supports, if it does not compel, the conclusion that unfettered jury discretion in capital sentencing is unconstitutional. What was at issue there, as here, was a state practice governing disposition. No "fair notice" problem was involved—except, of course, the problem noted by the Court, that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried to a jury having limitless sentencing power.[57] That decision turned squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether to impose upon a defendant a rather small item of costs.[58] It is not evident why, in the infinitely more significant matter of sentencing men to death, Alabama juries can be permitted the same lawless and standardless freedom.

Nor does footnote 8 in the *Giaccio* opinion blunt the implications of the *Giaccio* holding for our present purposes. In that footnote, a majority of this Court noted that it intended to cast no doubt on the constitutionality of leaving to juries finding defendants guilty of a crime the power to fix punishment "within legally prescribed limits." The precise problem in this case is that there were no "legally prescribed limits," in any realistic sense, to

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[57] The Court noted specifically that the problem of fair notice was only one of the problems with vague, standardless laws:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (382 U.S. at 402-403; emphasis added.)

[58] No First Amendment or other federal rights demanding the special protection afforded by a heightened requirement of statutory specificity, see *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963), were involved in *Giaccio*.

the jury's discretion. Further, that footnote speaks to jury sentencing generally, not capital sentencing.

> "It should be understood that much more is involved here than a simple determination of sentence. The State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." (*Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).)

Given the imprecision of the sentencing art, even when performed by judges, see *Tigner* v. *Texas*, 310 U.S. 141, 148-149 (1940), it may well be that juries can constitutionally be given some discretion in selecting a smaller or larger fine, a longer or shorter term of years, particularly where the range of choice is relatively circumscribed and the effect of the choice somewhat qualified by parole statutes and the continuing availability of post-conviction process to rectify after-discovered mistakes made at the trial. But the degree of arbitrariness allowed a State is not so liberal where grave and irremediable punitive exactions are at stake, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); and none is graver or more irremediable than the sentence of death by electrocution.

Nor did the Court in *Giaccio* have before it what has been presented here: evidence that in fact the sentencing discretion given juries has been exercised arbitrarily. See Part II, *supra*, of this brief. We do not hesitate to contend that the arbitrary and standardless discretion afforded Alabama juries constituted *per se* a deprivation of Boykin's constitutional rights. But evidence that abuse has in fact occurred in its administration—that only five men, all Negro, have been sent to death for robbery in the past thirty-eight years in this State—has considerable bearing on the issue whether a practice challenged on the grounds

of lawlessness tending to abuse is susceptible to that challenge, e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Louisiana* v. *United States*, 380 U.S. 145 (1965).

We do not contend here that the Due Process Clause forbids entirely the exercise of discretion in sentencing—even by a jury and even in a capital case. Ways may be found to delimit and guide discretion, narrow its scope, and subject it to review; and these may bring a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada, which makes certain reviewable findings of fact the indispensable condition of imposing capital punishment (see Nev. Rev. Stat. §200.363 (1967)); or the approach of California, which has adumbrated by judicial decision at least some of the impermissible considerations against which jurors are to be cautioned (see *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705 (1960)); or that of the Model Penal Code, which both establishes prerequisite findings and enumerates aggravating and mitigating circumstances (see AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6 (P.O.D. May 4, 1962), pp. 128-132); or that of the numerous States which provide plenary review of capital jury sentencing by trial and/or appellate courts, would be constitutional, is not the question presented. Concededly, the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance.

But as the issue of petitioner's sentence was submitted to the jury in its sole discretion under Alabama procedure, the attention of the jurors was directed to none of the purposes of criminal punishment, nor to any pertinent aspect or aspects of the defendant's conduct. They were not

invited to consider the extent of harm to the robbery victims, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant *"pour décourager les autres."* Cf. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all; at a whim, a vague caprice, or because of the color of Boykin's skin. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma, supra.* To concede the complexity and interrelation of sentencing goals, see *Packer, supra,* is no reason to sustain a procedure which ignores them all. It is futile to put forward justification for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably, under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied, is both unjustifiable and lawless, and, as shown by Alabama's record, pp. 53-54, *supra,* conventionally imposed only on the members of minority groups.

We submit that its imposition in the unfettered discretion of a jury violates the rule of law that is fundamental to Due Process.

IV.

Issues Not Presented

Before closing this brief, we think it is imperative to notice explicitly several issues which, in our judgment, the Court is not now called upon to decide. We venture with the utmost deference to identify these issues because of their extreme importance to the many condemned men whom we represent. Numerous of these men have stays of execution granted upon post-conviction petitions raising the issues. If, as we submit, none of the issues is presented in this *Boykin* case, we know that the Court would not want inadvertently to prejudice their subsequent presentation. Because of the nature of the issues and their relation to those briefed herein, there is some danger of this if we are negligent in failing to bring to the Court's attention precisely what these issues are.

First, the Court is not now called upon to determine whether the death penalty is cruel and unusual punishment for the crime of murder. Most of the men on death row today are there for murder, and they are presenting to a number of courts varying contentions attacking their death sentences under the Eighth Amendment. Some of these contentions stress the physical and psychological cruelties of execution, or its indignities; others focus upon the fortuity and apparent purposelessness of its application; still others press the unnecessary severity of capital punishment in view of the alternative means available to the state for achieving all of the legitimate ends of criminal sanctioning, either in particular cases or generally. We note that one of the very convincing points made by counsel for Boykin is that the death sentence for robbery is constitutionally disproportionate. Our own Eighth Amend-

ment argument in support of Boykin takes a different approach. See part II, *supra*, of this brief. But, if the Court should see fit to adopt reasoning of proportionality in applying the Eighth Amendment to Boykin's case, we earnestly hope that it will make clear what a proportionality rationale does not imply. Specifically, if the death penalty violates the Eighth Amendment because it is disproportionately severe for the crime of robbery, that does not imply that the death penalty is constitutionally acceptable for the crime of murder.

This is so for at least two reasons. (1) Even were proportionality theory the full measure of the Eighth Amendment, this Court is not now in a position to determine whether the death penalty is proportioned to the crime of murder. The determination that it is disproportioned to robbery does not necessarily establish that it is proportioned to murder; and there are some very good reasons to believe that it is not. A few reasons are suggested at pp. 33-35, *supra*, but they can hardly be adequately developed or considered in a case where the issue is not presented. (2) In any event, though proportionality be one command of the Eighth Amendment, it is surely not the sole command of the Eighth Amendment. Court-ordered maiming is arguably proportioned to the crime of mayhem, but we have no doubt that maiming would be held to violate the prohibition of cruel and unusual punishments. So, if the death penalty is unconstitutional when disproportioned, it is not thereby constitutional when proportioned. Other Eighth Amendment principles may yet condemn it.

Second, and in the same vein, the Court is not now called upon to determine whether the death penalty might be shown to be a cruel and unusual punishment on other grounds than those urged here, and on another record; nor to determine the right of a condemned man to make

such a record. In this connection, we note that we have been seeking in various courts the opportunity for an evidentiary hearing at which expert testimony relating to the actual physical and psychological effects of capital punishment might be received, together with similar testimony relating to the validity of the several state interests usually asserted to justify the state-ordered executions which have these effects. The refusal of one court to allow us such a hearing is at issue in one pending petition for certiorari here. *Forcella and Funicello* v. *New Jersey*, O.T. 1968, No. 947 Misc.

Whatever the disposition of that particular petition, we would hope that courts will not universally and perpetually decline to hear constitutionally relevant evidence. But no such evidence is contained in the remarkably spare *Boykin* record, and none was proffered by Boykin's court-appointed counsel. We think it important that this be made clear, so that nothing in the Court's deliberations here prejudices the right to offer evidence of the sort described, or prejudges the constitutional case which could be made by evidence.

Third, Boykin's petition for certiorari presents as a distinct question (number 6 among the Questions Presented) a claim of racial discrimination in the application of the death penalty to Alabama Negroes. In Boykin's brief, the claim and the evidence supporting it are put forward as part of his argument that the death penalty, in his case, is a cruel and unusual punishment. We agree that the apparent racial discrimination in the selection of the few, otherwise arbitrarily chosen men sentenced to die for robbery in Alabama and the handful of Southern States which retain capital punishment for this crime is highly relevant to the claim of cruel and unusual punishment, for reasons which we have developed in Part II, *supra*, of this brief. Racial

discrimination also appears to us germane to Boykin's contention that unfettered jury discretion in capital sentencing violates the rule of law fundamental to the Due Process Clause, as we have shown in Part III, *supra*.

But these submissions—properly resting upon evidence of racially differencial sentencing less exact and scientific than that which would be proffered to support a claim of discrimination under the Equal Protection Clause—should not be confused with the latter claim. Judicially noticeable indications of pervasive racial discrimination in the administration of the death penalty throughout the United States abound (see pp. 51-53, *supra*), and are quite legitimately noticed as matters of "constitutional fact" going to the Eighth Amendment argument. They would not generally, and without more, suffice to prove an out-and-out Equal Protection violation by a particular State, under *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

Elaborate—and exceedingly expensive—scientific research efforts may, however, result in proof which (together with the noticeable publications) amply carries the day under the Equal Protection Clause. Our Petition for Certiorari, in *Maxwell* v. *Bishop*, O.T. 1968, No. 622, submits that such a case was proved in Arkansas relating to capital sentencing for the crime of rape. A still more convincing case might be made in Alabama with regard to capital rape sentencing. But that evidence is not in this record. We have pointed out above that—apart from the fact that its procurement would have been beyond Boykin's resources—scientific analysis of racial patterns for capital *robbery* sentencing in Alabama would be virtually impossible, by reason of the infinitesimally small number of persons sentenced to death for robbery in that State (or any State) in recent years. This latter circumstance highlights the force of Boykin's contention under the Cruel and Un-

usual Punishment Clause; it also makes imperative an appreciation of the distinction between the Eighth Amendment contention and an Equal Protection claim.

Finally, Boykin's petition for certiorari presents (as question number 4 among the Questions Presented) a constitutional challenge to the "unitary" or single-verdict method of trying the issues of guilt and punishment in a capital case. On a proper record, that question would be a very substantial one. See the petitions for certiorari in the *Johnson, Mathis* and *Maxwell* cases, cited at note 7, para. (3), *supra.*

But the issue is not briefed by counsel for Boykin, for the reason, we would think, that it is hardly presented on this record. Boykin pleaded guilty; and, for aught that appears, the jury trial which followed his plea was for the sole purpose of fixing punishment. At the most, the guilt question was tried in a formal sense, on judicial confession.

And so—although, again, Boykin's case might look different on a different record—it is apparent that the present record raises no question of the constitutionality of trying guilt and punishment simultaneously in a capital case. That question will properly arise in a capital case where guilt is tried.

CONCLUSION

Edward Boykin's guilty plea was accepted without the safeguards required by the Due Process Clause. His sentence to death for the crime of robbery violates the Eighth Amendment's prohibition of cruel and unusual punishment. The method by which his sentence was determined, in the unregulated and lawless discretion of the jury, violates the rule of law fundamental to due process. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Provisions of the Criminal Statutes of the Fifty American States Providing for the Punishment of Death:

ALABAMA

Code of Ala., (Recomp. Vol. 1958): §14-7 (kidnapping for ransom); §14-8 (attempted kidnapping for ransom); §14-23 (first degree arson with loss of life or maiming); §14-24 (second degree arson with loss of life or maiming); §14-39 (assault on prison guard or any murder by life term prisoner); §14-84 (burglary); §14-97 (sabotage); §14-123 (dynamiting under or near inhabited area); §14-315 (killing in duel); §14-316 (killing with concealed weapon); §14-318 (murder); §14-355 (lynching); §14-395 (rape); §§14-397, 14-398 (carnal knowledge); §14-415 (robbery); §14-416 (train robbery); §14-424 (treason).

ARIZONA

A.R.S., (1956): §13-250 (armed assault by life term prisoner); §13-453 (murder); §13-492 (kidnapping for ransom where victim is harmed); §13-572 (perjury in capital case resulting in death of innocent person); §13-644 (train robbery); §13-701 (treason).

ARKANSAS

Ark. Stat. Ann., (1947): §41-502 (arson of prison by convict); §41-2213 (killing in duel); §41-2214 (captain of boat causing death by deliberately ramming into craft); §41-2216 (police officer causing death by exceeding bounds of moderation); §41-2223 (causing death of woman by abortion); §41-2227 (murder); §41-2304 (kidnapping for ransom or victim harmed); §41-3403 (rape); §41-3405 (carnal knowledge of woman intentionally drugged); §41-3411 (forcing woman to marry).

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CALIFORNIA

West's Ann. Cal. Penal Code (1954): §37 (treason); §128 (perjury in capital case resulting in death of innocent person); §190 (murder); §209 (kidnapping for ransom or robbery where victim is harmed); §219 (train wrecking); §4500 (armed assault by life term prisoner).

COLORADO

Col. Rev. St. (1963): §40-2-3 (murder); §40-2-45 (kidnapping where victim suffers bodily harm); §40-2-51 (causing death of woman by abortion); §40-7-3 (perjury in capital case resulting in death of innocent victim); §40-7-49 (armed assault by escaped life prisoner); §40-23-14 (causing death during commission of criminal anarchy).

CONNECTICUT

C.G.S.A. (1967): §53-1 (treason); §53-3 (killing president or ambassador); §53-10 (causing death by train wrecking); §53-10 (causing death by arson or bombing); §53-10 (murder); §53-27 (killing kidnap victim).

DELAWARE

11 Del. C. (1967 Cum. Supl.): §107 (murder).

FLORIDA

F.S.A. (1965): §782.04 (murder); §782.05 (killing in duel); §782.06 (causing death by train wrecking); §790.16 (throwing bombs or discharging machine gun in public place); §790.161 (throwing bombs damaging private property where death results); §794.01 (rape or carnal knowledge where victim under ten); §805.02 (kidnapping for ransom).

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GEORGIA

Ga. Code Ann. (1953): §26-801 (treason); §26-903 (insurrection including attempts); §26-1[illegible]05 (murder); §26-1103 (feticide); §26-1104 (advising woman to kill child before birth or after delivery); §26-1208 (castration); §26-1302 (rape); §26-1304 (carnal knowledge where victim under fourteen); §26-1603 (kidnapping for ransom); §26-2204 (burning or attempting to burn railroad bridge); §26-2206 (arson resulting in death); §26-2301 through §26-2303 (dynamiting inhabited structure); §26-2502 (armed robbery); §26-4007 (perjury in capital case resulting in death of accused); §26-5203 (killing in duel); §26-5401 (mob violence resulting in death); §26-7314 (train wrecking resulting in death); §26-7320 (causing death by mishandling poisonous reptiles); §26-8117 (desecration of burial place with intent to rob, molest or mutilate).

IDAHO

Ida. Code (1947): §18-4004 (murder); §18-4504 (kidnapping for ransom where victim harmed); §18-5411 (perjury in capital case resulting in death of innocent person); §18-6007 (causing death by train wrecking).

ILLINOIS

Ill. Ann. St., (1961): c. 38, §9-1 (murder); c. 38, §10-2 (kidnapping for ransom); c. 38, §30-1 (treason).

INDIANA

Burns Ind. St. (1956): §10-307 (arson causing death); §10-3306 (mob lynching causing death); §10-3401 (murder); §10-3402 (killing in duel); §10-3902 (causing death by train wrecking); §10-2903 (kidnapping for ransom); §10-4401 (treason).

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KANSAS

K.S.A. (1963): §21-201 (treason); §21-403 (murder); §21-449 (kidnapping for ransom where victim harmed); §21-702 (perjury in capital case resulting in death of accused).

KENTUCKY

Ky. Rev. Stat. Ann. (1963): §433.10 (armed robbery or armed burglary); §433.150 (assault to rob or intent to rob); §433.390 (causing death by train wrecking); §435.010 (murder); §435.040 (causing death of woman by abortion); §435.030 (killing during advocacy of criminal syndicalism); §435.070 (lynching); §§435.080 435.090 (rape); §435.140 (kidnapping for ransom); §435.190 (reckless shooting into train or motor vehicle).

LOUISIANA

L.S.A. (1950): §14:30 (murder); §14:42 (aggravated rape); §14:44 (aggravated kidnapping); §14:113 (treason).

MARYLAND

Ann. Code of Md. (1957): §27-12 (assault with intent to commit rape); §27-337 (kidnapping); §27-410 (killing any person while attempting to escape prison); §27-413 (murder); §27-453 (causing death by train wrecking); §27-461 (rape); §27-462 (carnal knowledge of child under fourteen).

MISSISSIPPI

Miss. Code Ann. (Recomp. Vol. 1956): §2096 (killing in duel); §2143 (bombing in or near inhabited area); §2217 (murder); §2222 (causing death of woman by abortion);

§2238 (kidnapping); §2358 (rape including attempts); §2367 (armed robbery); §2397 (treason).

MISSOURI

Vernon's Mo. Stat. Ann. (1953): §557.020 (perjury in capital case resulting in death of accused); §559.030 (murder); §559.230 (kidnapping for ransom); §559.260 (rape); §559.300 (carnal knowledge under sixteen); §560.135 (armed robbery); §560.140 (train robbery); §562.010 (treason); §564.560 (bombing).

MONTANA

Rev. Code of Mont. (1947): §94-2505 (murder); §94-2601 (kidnapping for ransom); §94-3207 (causing death by train wrecking); §94-3207, §94-3813 (perjury in capital case resulting in death of innocent person); §94-4501 (treason).

NEBRASKA

Neb. Rev. St. (1943): §28-401 (murder).

NEVADA

N.R.S. (1967): §196.010 (treason); §199.160 (perjury resulting in death of innocent person); §200.030 (murder); §200.363 (rape with substantial bodily harm); §200.320 (kidnapping for ransom with bodily harm to victim); §200.400 (assault with intent to rape accompanied with acts of violence and bodily harm); §200.410 (killing in duel); §202.270 (dynamiting); §212.060 (life prisoner killing any person while attempting escape).

NEW HAMPSHIRE

N.H. Rev. St. Ann. (1955): §585.4 (murder).

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NEW JERSEY

N.J. Stat. Ann. (1939): §2A:113-4 (murder); §2A:118-1 (kidnapping for ransom); §2A:148-1 (treason); §2A:148-6 (attempt or conspiracy to assault chief of state).

NEW MEXICO

N. Mex. St. (1964 Repl. Vol.): §40A-2-1 (murder); §40A-4-1 (kidnapping for ransom with bodily harm).

NEW YORK

McKinney's Con. Penal Laws (1967): §125.60 (murder of police officer or by life term prisoner).

NORTH CAROLINA

Gen. St. of N.C. (1953): §14-17 (murder); §14-20 (killing in duel); §14-21 (rape); §14-52 (burglary); §14-58 (arson); §14-278 (causing death by train wrecking).

OHIO

Rev. Code Ann. (1953): §2901.01 (murder); §2901.02 (causing death by train wrecking); §2901.03 (convict killing guard); §2901.04 (killing police officer on duty); §2901.09 (killing federal or state chief of state); §2901.27 (kidnapping for ransom); §2901.28 (abduction resulting in death).

OKLAHOMA

Okla. St. Ann. (1958), Tit. 21: §707 (murder); §745 (kidnapping for ransom); §801 (armed robbery); §1115 (rape).

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PENNSYLVANIA

Purdon's Pa. St. Ann. (1962): §4701 (murder); §4710.2 (assault with intent to kill by life term prisoner); §3765 (lynching); §4919 (causing death by train wrecking).

SOUTH CAROLINA

S.C. Code Ann. (1962): §16-52 (murder); §16-54 (killing by stabbing); §16-57 (lynching); §16-63 (killing in duel); §§16-72, 16-80 (rape as well as assault with attempt to rape, also carnal knowledge); §16-91 (kidnapping where victim is not released alive before trial); §16-92 (conspiracy to kidnap); §17-553 (third conviction for crimes optionally punishable by death); §§44-353, 44-354 (giving information or aiding enemy in time of war).

SOUTH DAKOTA

S.D. Code of 1939: §13.2012 (murder); §13.2701 (kidnapping where victim is bodily harmed).

TENNESSEE

Tenn. Code Ann. (1955): §39-2405 (murder); §39-2603 (kidnapping for ransom); §39-2803 (assault with deadly weapon while in disguise); §39-3702 (rape); §§39-3703 through 39-3706 (carnal knowledge); §39-3901 (armed robbery).

TEXAS

Tex. Pen. Code Ann. (1961): §33 (instigation of a minor by a relative or spouse to commit a capital crime); §84 (treason); §309 (perjury in capital case resulting in an execution); §1177(a) (kidnapping for ransom); §1183 (carnal knowledge); §1189 (rape); §1257 (murder); §1260a (lynching); §1408 (armed robbery).

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UTAH

Utah Code Ann. (1953): §76-7-12 (armed assault by life term prisoner); §76-16-2 (killing in duel); §76-30-4 (murder); §76-35-1 (kidnapping for ransom).

VERMONT

13 V.S.A. (1968 Cum. suppl.): §2303 (second first degree murder offense and murder of prison guard or police officer).

VIRGINIA

Code of Va. (Repl. Vol. 1960): §18.1-16 (attempt to commit rape); §18.1-22 (murder); §18.1-38 (kidnapping for ransom or immoral purposes); §18.1-44 (rape and carnal knowledge); §18.1-75 (arson); §18.1-86 (burglary); §18.1-90 (armed bank robbery); §18.1-91 (aggravated robbery); §18.1-259 (machine gun used in perpetration of crime of violence); §18.1-418 (treason).

WASHINGTON

R.C.W.A. (1961): §9.48.030 (causing death by train wrecking); §9.48.030 (murder); §9.2.010 (kidnapping for ransom); §9.82.010 (treason).

WYOMING

Wyo. St. (1957): §6-54 (murder); §6-56 (killing in duel); §6-59 (kidnapping for ransom or robbery where victim harmed); §6-61 (child stealing); §37-248 (causing death by train wrecking or boarding train with intent to commit a felony).

APPENDIX B

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Crim. 11572

In re ROBERT PAGE ANDERSON
on Habeas Corpus.

Crim. 11573

In re FREDERICK SATERFIELD
on Habeas Corpus.

(Two Cases)

[*Opinion by Burke, J.*]

The issue here presented is whether the death penalty and the procedures followed in imposing it are constitutional, and not whether it should be retained or abolished in California. Retention or abolition raises a question of legislative policy which under our system of division of powers falls within the competence of the Legislature or the electorate.

A jury found Frederick Saterfield guilty on two counts of first degree murder and fixed the penalty on each count at death; the judgment was affirmed (*People* v. *Saterfield*, 65 Cal.2d 752 [cert. den. 389 U.S. 942 and 964]). A jury also found Robert Page Anderson guilty of first degree murder, attempted murder of three other men, and first

degree robbery, and fixed the penalty at death for the murder; the judgment was affirmed (*People* v. *Anderson*, 64 Cal.2d 633).

Saterfield and Anderson now seek habeas corpus on the grounds that (1) it was improper to excuse for cause veniremen conscientiously opposed to the death penalty; (2) Penal Code sections 190 and 190.1 are unconstitutional because they contain no standards to assist the trier of fact in determining whether to impose death or life imprisonment; (3) the death penalty, per se and as applied, constitutes cruel and unusual punishment; and (4) petitioners have been denied their right to counsel in post-state-appeal proceedings. We issued orders to show cause and pending final determination of the instant proceedings stayed all judgments of death in California. Counsel in all pending automatic appeals and other attorneys were afforded an opportunity to file amicus curiae briefs, in which additional arguments have been presented challenging the constitutionality of the death penalty as applied in California.

We hold that the death penalty is constitutional and does not constitute cruel or unusual punishment, that Penal Code sections 190 and 190.1 are valid, and that in keeping with a newly declared policy of this court petitioners, and all other indigent defendants in capital cases, in the interests of justice, will be afforded the services of counsel in all proceedings between the termination of their state appeals and their execution. We have further concluded that under the compulsion of the June 3, 1968, decision of the United States Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, the death penalties in the two cases now before us must be set aside because certain prospective jurors were improperly excused for cause. It is necessary, therefore,

that petitioners be remanded to the trial courts for new trials limited to the issue of penalty.

Excusing Veniremen Opposed To Death Penalty

Petitioners argue that excusing for cause veniremen conscientiously opposed to the death penalty deprived them of a jury which fairly represented a cross section of the community and tended to assure the state a jury whose members were favorable to the prosecution at each phase of the trial. At Saterfield's trial two prospective jurors were excused for cause on the ground of their opposition to the death penalty. Likewise at Anderson's trial seven prospective jurors and one prospective alternate juror were excused for cause on that same ground.

At each trial one or more of the prospective jurors excused on that ground did not make it "unmistakably clear (1) that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . . or (2) that [his] attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt," as mandated by the *Witherspoon* decision. (391 U.S. 510, 522-523, fn. 21.) For example, at Saterfield's trial one prospective juror stated, "I am opposed to the death penalty," and was thereupon excused for cause; at Anderson's trial one prospective juror in response to the question "Do you know of any reason you couldn't be a fair and impartial juror in this case?" replied, "Yes, sir, I do. I don't believe in capital punishment" and was immediately excused for cause. In neither instance had the court made it clear to that particular prospective juror that opposition to the death penalty or conscientious scruples against that penalty would be insufficient by itself to disqualify such a juror

from serving. This is not surprising, because the trials preceded the decision of the United States Supreme Court in *Witherspoon* v. *Illinois, supra,* 391 U.S. 510, which sets forth new rules that the states are not only compelled to follow but must apply retroactively (see fn. 22, at p. 523).

Witherspoon held "that a sentence of death can not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon* further stated that "No defendant can constitutionally be put to death at the hands of a tribunal so selected" but that "nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*"

Witherspoon, therefore, requires us to set aside the death penalties imposed on petitioners and to have the issue of penalty retried. There is no merit to the Attorney General's contention that, since, assertedly, the California law at the time of petitioners' trials was not materially different from the rules in *Witherspoon*, defense counsels' failure to object to the exclusion of the prospective jurors in question bars petitioners from now claiming error. At the time of petitioners' trials, under decisions interpreting Penal Code section 1074, subdivision (8), it was proper to excuse for cause prospective jurors who "did not believe in capital

punishment" or who were "conscientiously opposed to capital punishment" as well as those "whose consciences would preclude them from imposing [the death penalty]." (E.g. *People* v. *Shipp*, 59 Cal.2d 845, 853 [cert. den. 377 U.S. 999]; *People* v. *Love*, 56 Cal.2d 720, 726; *People* v. *Duncan*, 53 Cal.2d 803, 816 [pet. for cert. granted, 363 U.S. 840; writ dismissed 366 U.S. 417]; *People* v. *Wein*, 50 Cal.2d 383, 394 [cert. den. 358 U.S. 866]; *People* v. *Riser*, 47 Cal.2d 566, 573-576 [app. dism. 358 U.S. 646]; *People* v. *Hoyt*, 20 Cal.2d 306, 316; *People* v. *Kynette*, 15 Cal.2d 731, 744-745 [cert. den. 312 U.S. 703]; see *People* v. *Carter*, 56 Cal.2d 549, 573, fn. 10.) It is obvious that *Witherspoon* made a material change in the law in this state. Since petitioners were tried before *Witherspoon*, failure to object to the exclusion of the prospective jurors in question does not bar petitioners from now claiming error. (Cf. *People* v. *Nye*, 63 Cal.2d 166, 175; *People* v. *Love*, *supra*, 56 Cal.2d 720, 731-732; *People* v. *Kitchens*, 46 Cal.2d 260, 262-263.)

The Attorney General also contends that any error under *Witherspoon* in excusing for cause prospective jurors opposed to the death penalty is nonprejudicial where, as here, the prosecution had sufficient peremptory challenges to remove all such jurors. The Attorney General asserts that since the chances of a jury's being able to determine the penalty impartially are diminished if the jury contains even one person who is hostile to, or has reservations concerning, the death penalty, it may be assumed that, if the challenges for cause had not been available, the prosecutors would have excluded the veniremen in question by way of peremptory challenge; that a prosecutor may constitutionally exercise his peremptory challenges in a particular case for any purpose he deems proper (*Swain* v. *Alabama*, 380 U.S. 202, 221-222); and that therefore any error in exclud-

ing for cause the veniremen in question did not affect the composition of the juries at petitioners' trials and is not a ground for vacating the death sentences.

We do not agree. *Witherspoon* did not discuss the effect of the existence of remaining peremptory challenges of the *prosecution*, but the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon*, reversal is automatically required a venireman was improperly excused for cause on the basis of his opposition to the death penalty. It may be noted that in *Witherspoon* the *defense* had three remaining peremptory challenges when it accepted the jury, but that fact was not viewed as showing that the jurors who were impaneled were impartial and that therefore no harm resulted from improperly excusing for cause some prospective jurors. Furthermore, in arguing that it may be assumed that the prosecutor would have used his peremptory challenges to remove veniremen who under *Witherspoon* were improperly excused for cause, the Attorney General bases his argument on a concept of an impartial jury that is in conflict with the majority opinion in *Witherspoon*. Under the view of the *Witherspoon* majority a jury from which all prospective jurors opposed the death penalty have been excluded is not an impartial jury but rather constitutes a "hanging jury," one that is "uncommonly willing to condemn a man to die," and one that "cannot speak for the community" but "can speak only for a distinct and dwindling minority." We cannot engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors.

Appendix B

Witherspoon left undecided the question whether the exclusion of veniremen opposed to capital punishment necessitates setting aside the judgment as to guilt. The opinion noted (fn. 11, p. 517) that during the post-conviction proceedings there under review no request was made to submit evidence on the matter. The petitioner in that case pointed to certain materials, but the United States Supreme Court stated, "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." [1]

In the instant case petitioners made a motion for an evidentiary hearing regarding their claim that the exclusion of veniremen opposed to capital punishment results in an unrepresentative jury on the issue of guilt and substantially increases the risk of conviction. We denied the motion in December 1967. Petitioners have again requested such a hearing and ask that we reconsider the matter in the light

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[1] *Witherspoon* further declared (fn. 18, p. 520), that "in some future case" a defendant convicted by a jury from which the state had excluded only those prospective jurors who stated that they would not even consider returning a death penalty "might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

In *Witherspoon* one of the three dissenting justices similarly stated (fn. 1, p. 541), "I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt."

of *Witherspoon*. They state that they have arranged with Louis Harris and Associates to conduct a described study and that the result of this study "is suggestive of the kind of factual inquiry whose product can be presented at an evidentiary hearing." They further state that the Harris study has not yet been finished and that preparation for an evidentiary hearing will require "several more months—at the least." What was stated by the New Jersey Supreme Court in response to a request for the same type of evidentiary hearing is applicable, namely, ". . . we cannot suspend the judicial process until projected studies are made at the behest of a litigant. This is especially true when the studies are of a sociological or psychological nature, for the prospect is remote that such studies will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area." (*State of New Jersey* v. *Forcella* (July 1968) —— A.2d ——.) It is thus unnecessary to consider at this time various arguments of the Attorney General in support of his position that petitioners are not entitled to an evidentiary hearing.

Penalty Discretion: Standards

Petitioners further contend that Penal Code sections 190 and 190.1 violate the due process and equal protection clauses of the United States Constitution because those sections, allegedly without specifying any standards, impose on the trier of fact the duty of selecting the penalty. It is asserted that the absence of standards prevents a defendant from knowing how to defend himself at the penalty trial, permits the trier of fact to impose the death

penalty for arbitrary reasons, and precludes a meaningful review of the penalty imposed.

Section 190, as enacted in 1872, specified the death penalty as the sole punishment for first degree murder. By the amendments of 1873-1874, the section vested in the trier of fact discretion to fix the penalty at death or life imprisonment, and from that time to the present date no amendments to the section have modified or limited in any way the absolute discretion of the trier of fact to determine which of the two penalties to impose.[2] Section 190.1, as enacted in 1957 and amended in 1959, likewise does not limit that discretion.

This court has held repeatedly that under sections 190 and 190.1 the Legislature has entrusted to the absolute discretion of the trier of fact the awesome decision between

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[2] Section 190 provides: "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, . . ." (Amendments to the Codes, 1873-1874, p. 457; Stats. 1921, ch. 105, § 1, p. 98; Stats. 1927, ch. 889, § 1, p. 1952; Stats. 1957, ch. 1968, § 1, p. 3509.)

Section 190.1 provides: "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. . . ."

life imprisonment and death for first degree murder (e.g. *People* v. *Polk*, 63 Cal.2d 443, 454 [cert. den. 384 U.S. 1010]; *People* v. *Hines*, 61 Cal.2d 164, 168-169; *People* v. *Purvis*, 56 Cal.2d 93, 96; *People* v. *Brice*, 49 Cal.2d 434, 437; *People* v. *Green*, 47 Cal.2d 209, 218), and that the law does not prescribe or authorize the court to innovate any rule circumscribing the exercise of that discretion—that the jury need not find ameliorating circumstances to impose life imprisonment, nor need they find aggravating circumstances to impose death (e.g. *People* v. *Hamilton*, 60 Cal.2d 105, 136; *People* v. *Lane*, 56 Cal.2d 773, 786; *People* v. *Green*, *supra*, 47 Cal.2d 209; *People* v. *Friend*, 47 Cal.2d 749, 767). An instruction directing the jury to fix the penalty at death unless they found extenuating circumstances was held contrary to the statute and erroneous in *People* v. *Green*, *supra*, 47 Cal.2d 209, 217, which overruled a line of cases originating with *People* v. *Welch* (1874) 49 Cal. 174, that approved such an instruction.

Although the jury has absolute discretion in determining which penalty to impose, safeguards exist to protect against any possibility of arbitrary action. In disposing of a defendant's motion for a new trial, the trial judge has the duty to review the evidence to determine whether in his independent judgment the weight of the evidence supports the jury's verdict, and if he decides it does not, he has the power to reduce the penalty to life imprisonment. (Pen. Code, §1181, subd. 7; *People* v. *Hill*, 66 Cal.2d 536, 567-568 [cert. den. 389 U.S. 1009]; *People* v. *Love*, *supra*, 6 Cal.2d 720, 727-729; *People* v. *Moore*, 53 Cal.2d 451, 454.) In addition, the Governor has the power to grant a pardon or commutation. (Cal. Const., art. V, §13; Pen. Code, §4800 et seq.) This court, however, has consistently and repeatedly held that it has no power to substitute its judgment

as to choice of penalty for that of the trier of fact. (E.g. *People* v. *Lookadoo*, 66 Cal.2d 307, 327; *People* v. *Mitchell*, 63 Cal.2d 805, 821 [cert. den. 384 U.S. 1007]; *People* v. *Howk*, 56 Cal.2d 687, 699-701; *People* v. *Monk*, 56 Cal.2d 288, 300; *People* v. *Rittger*, 54 Cal.2d 720, 734-735; *People* v. *Cash*, 52 Cal.2d 841, 845; *People* v. *Linden*, 52 Cal.2d 1, 26 [cert. den. 364 U.S. 849]; *People* v. *Green*, *supra*, 47 Cal.2d 209, 235; *People* v. *Harrison*, 41 Cal.2d 216, 219; *People* v. *Dessauer*, 38 Cal.2d 547, 555 [cert. den. 344 U.S. 858]; *People* v. *Thomas*, 37 Cal.2d 74, 77-78; *People* v. *Odle*, 37 Cal.2d 52, 58; *People* v. *Danielly*, 33 Cal.2d 362, 383 [cert. den. 337 U.S. 919]; *People* v. *Tuthill*, 32 Cal.2d 819, 827.)

The constitutionality of sections 190 and 190.1, as construed by this court, has been upheld. Repeated previous attacks upon one or both of the sections on the ground that their failure to provide standards rendered them unconstitutional or impermissibly vague or a violation of due process consistently have been rejected. (E.g. *People* v. *Hill*, *supra*, 66 Cal.2d 536, 568-569 [cert. den. 389 U.S. 993]; *People* v. *Seiterle*, 65 Cal.2d 333, 340 [cert. den. 387 U.S. 912]; *People* v. *Mason*, 54 Cal.2d 164, 169.)[3]

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[3] The suggestion that the previous decisions of this court assumed that constitutional doctrines applicable to statutes regulating conduct did not govern statutes prescribing penalties is devoid of merit. Not only in *Hill*, *Seiterle*, and *Mason*, but in other cases involving various constitutional attacks on penalty statutes we have not assumed constitutional doctrines were inapplicable but rather have held that the statutes complied with the Constitution and have rejected the attacks on their merits. (E.g. *People* v. *Turville*, 51 Cal.2d 620, 638; *In re Watkins*, 64 Cal.2d 866, 869-870.) Nor is reexamination of *Hill*, *Seiterle*, and *Mason* required by the statement in *Witherspoon* that "It should be understood that much more is involved here than a simple determination of sentence." Manifestly at the time of our cited cases we were fully aware of what was there involved.

Appendix B

In other jurisdictions courts have likewise rejected claims that due process or equal protection was violated by statutes vesting in the trier of fact unguided discretion in the choice between the penalties of death and life imprisonment. (*Maxwell* v. *Bishop*, 398 F.2d 138, 148-150; *In re Ernst's Petition*, 294 F.2d 556, 560-561 [cert. den. 368 U.S. 917]; *State* v. *Walters* (Conn.) 138A.2d 786, 792-794 [app. dism. and cert. den. 358 U.S. 46]; *State* v. *Latham* (Kan.) 375 P.2d 788, 796-799 [cert. den. 373 U.S. 919]; *Chatterton* v. *Dutton* (Ga.) 154 S.E.2d 213, 215 [cert. den. 389 U.S. 914]; *State* v. *Forcella, supra,* (N.J.) —— A.2d ——; *State* v. *Johnson* (N.J.) 168 A.2d 1, 10-11 [app. dism. "for want of a substantial federal question," 368 U.S. 145, cert. den. 368 U.S. 933]; see also *Ex Parte Sullivan*, 83 F.2d 796, 798.)

The statutes in *State* v. *Latham, supra,* and *Ex Parte Sullivan, supra,* are similar in form to our sections 190 and 190.1. In the other out-of-state cases the statutes specify that the penalty for first degree murder shall be death unless the jury recommends life imprisonment. It has been suggested that this difference has constitutional significance because such statutes empower the jury to mitigate the death penalty whereas under our statutes the jury selects between two alternative penalties neither of which is given preference by the Legislature (see *People* v. *Green, supra,* 47 Cal.2d 209, 218). In effect, however, both forms confer unguided discretion upon the jury as to the choice of penalties and it would exalt form over substance to conclude that one violates due process and equal protection and the other does not. As we shall see, in one sense both approaches serve to mitigate capital punishment, and both have been widely used throughout the United States (see American Law Institute, Model Penal Code Tentative Draft No. 9 (1959) pp. 121-126; Knowlton, *Problems of Jury*

Discretion in Capital Cases (1953) 101 U.Pa.L.Rev. 1099, 1101-1103).

Vesting in the trier of fact unguided discretion in the choice between penalties for first degree murder has long been characteristic of the laws of the United States and of many states. (See *In re Ernst's Petition, supra,* 294 F.2d 556, 560; see generally Knowlton, *Problems of Jury Discretion in Capital Cases, supra,* 101 U.Pa.L.Rev. 1099, 1101-1103.) The Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision. (*People* v. *Polk, supra,* 63 Cal.2d 443, 451.)

It may be neither practicable nor desirable that any rigid formula control a trier of fact in determining whether to extend mercy by imposing life imprisonment or to deny it by imposing death. (See *In re Ernst's Petition, supra,* 294 F.2d 556, 560-561; *State* v. *Johnson, supra,* 168 A.2d 1, 10-11; Royal Commission on Capital Punishment 1949-1953 Report, pp. 173-174 and 195.) But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional.

A statute mitigating capital punishment is not essentially unfair to the wrongdoer for failure to specify standards for the exercise of that discretion. Sections 190 and 190.1, like the Federal Kidnapping Act which was involved in *United States* v. *Jackson,* 390 U.S. 570, 581-582,[4]

[4] *United States* v. *Jackson, supra,* held unconstitutional the death penalty provision of the Federal Kidnaping Act, which permitted imposition of the death penalty only upon defendants who assert their right to be tried by a jury, reasoning that the effect of the provision was to needlessly penalize the assertion of the Fifth Amendment right to plead not guilty and the Sixth Amendment right to demand a jury trial. California Penal Code sections 190 and 190.1 do not contain this constitutional infirmity.

have as an objective the avoidance of "the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act [or California Penal Code sections 190 and 190.1] may be viewed as ameliorating the severity of the more extreme punishment that Congress [or the state Legislature] might have wished to provide."

The discretion conferred upon the penalty jury is similar to that conferred on the trial court to punish certain crimes as either felonies or misdemeanors. Many sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of such crimes to state prison or to jail, without mention of standards for exercise of that discretion. (E.g. Pen. Code, §§17, 476a, 489, 496, 525.) Such sections have been held not to violate due process or equal protection. (*In re Watkins, supra,* 64 Cal.2d 866, 869-870; *In re Rosencrantz,* 211 Cal. 749, 750-751; *People* v. *Widener,* 220 Call.App.2d 826, 830; cf. *Smith* v. *Rhay,* 254 F.2d 306, 308; *Daloai* v. *Rhay,* 252 F.2d 768, 770-771.) *In re Watkins, supra,* at page 870, states, " 'Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute.' "

It has been suggested that the similarity between the discretion conferred on a penalty jury to choose between life imprisonment and death and the discretion conferred on a trial court to sentence a defendant to state prison or to jail is only superficial because (1) the trial court, unlike the penalty jury, does not select between two legislatively neutral alternative penalties; (2) the trial court's sentencing discretion is circumscribed by standards in-

herent in the penological regime of rehabilitation, whereas the penalty jury's discretion is not so circumscribed; (3) the decision rendered by the trial court is of less gravity than that rendered by the penalty jury; and (4) the trial court's discretion is not absolute since the defendant may seek appellate review on the ground of abuse of discretion, whereas the penalty jury's discretion is absolute.

The asserted distinctions are not persuasive. In both cases the Legislature has prescribed the punishments available; in both it has authorized a specified body to make a choice within the legally prescribed limits. The fact that a crime punishable as a felony or a misdemeanor is regarded as a felony unless and until the trial court imposes a misdemeanor sentence (Pen. Code, §17; *People* v. *Banks*, 53 Cal.2d 370, 380-383; *People* v. *Finley*, 219 Cal. App.2d 330, 341) does not show that the Legislature prefers a felony sentence to be imposed by the trial court. Although the form of the choice by which the discretion conferred is to be exercised differs, this difference does not warrant contrary conclusions concerning the constitutionality of the respective statutes.

A defendant's potential for rehabilitation is but one of several factors the trial court considers in determining whether to sentence a defendant to jail or to state prison. The trial court also considers matters such as the community's need for protection (see *People* v. *Smith*, 259 A.C.A. 923, 928), and no specific standard controls the exercise of the trial court's discretion. A defendant's potential for rehabilitation is similarly an appropriate factor for the penalty jury to consider in determining which penalty to impose. (See *People* v. *Morse*, 60 Cal.2d 631, 647; see also *People* v. *Polk*, *supra*, 63 Cal.2d 443, 451.)

The trial court's decision may be of less gravity than

that of the penalty jury, but both decisions involve grave consequences to the individuals involved. And finally, although the penalty jury has absolute discretion to determine which penalty to impose, such discretion, as we have seen, is absolute only in the first instance since the trial judge in ruling on a motion for a new trial, has the power to reduce the penalty to life imprisonment if in his independent judgment the weight of the evidence does not support the death penalty.

It should also be noted that *Witherspoon* v. *Illinois*, *supra*, 391 U.S. 510, mentions lack of standards in selecting between death and life imprisonment and gives no intimation that the procedure is therefore unconstitutional.[5]

Reliance by petitioners upon *Giaccio* v. *Pennsylvania*, 382 U.S. 399, is misplaced. As we pointed out in *People* v. *Seiterle*, *supra*, 65 Cal.2d 333, 340 (cert. den. 387 U.S. 912), *Giaccio* "is not contrary to the cited cases [which held §190.1 constitutional]. *Giaccio* held that a statute permitting a jury to assess costs against an acquitted defendant was constitutionally invalid because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory

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[5] *Witherspoon* states (at p. 519), "Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life and death,[15]" and footnote 15 reads in part "[Illinois] has deliberately 'made . . . the death penalty . . . an optional form of punishment which [the jury remains] free to select or reject as it [sees] fit.' [Citation.] And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101. . . ."

imposition of costs. The court expressly stated in *Giaccio* that 'In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.' (382 U.S. at p. 405, fn. 8.)" (See also *Maxwell* v. *Bishop, supra,* 398 F.2d 138, 149-150; *State* v. *Forcella, supra* (N.J.) —— A.2d ——.)

The instant case differs from *Skinner* v. *Oklahoma,* 316 U.S. 535, cited by petitioners. *Skinner* held that a statutory classification requiring sterilization under specified circumstances of persons convicted of larceny but not those convicted of embezzlement was a violation of equal protection. The court stated in part (at p. 541) "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes the one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Penal Code sections 190 and 190.1, however, do not contain an unconstitutional classification, and, since under like circumstances every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the sections.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (*Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal.2d 536, 549; *Patton* v. *La Bree,* 60 Cal.2d 606, 609; *In re Cregler,* 56 Cal.2d 308, 311.)

No authority has been cited holding that statutes like Penal Code sections 190 and 190.1 violate due process

or equal protection. For the reasons set forth above we are satisfied that we should not depart from our previous conclusion in this regard.

No Delegation Of Legislative Power To Jury

It is also asserted that Penal Code sections 190 and 190.1, as presently construed and applied, delegate to the penalty jury a legislative function in a manner that violates the section of the state Constitution providing for separation of powers (art. III, §1). It is argued that the members of the jury have been delegated legislative powers because they must resolve basic policy questions with regard to the type of punishment to be imposed, as opposed to the extent of punishment to be imposed. That delegation is said to be improper because the sections do not contain standards sufficiently certain to preclude arbitrary exercise of that power by the jury, or to insure a reasonable opportunity of securing redress by judicial review if that power is abused. The same contention with regard to a statute similar to ours was rejected by the Supreme Court of Kansas in *State* v. *Latham, supra,* 375 P.2d 788, 798: "The legislative power was exercised when the legislature fixed the punishment for murder in the first degree. The statute does no more than empower a jury, upon a consideration of all the evidence and the court's instructions, to assess the extent of punishment prescribed beforehand in accordance with the heinousness or gravity of the homicide. In performing that duty, the jury in no sense exercises legislative power." Similar contentions with regard to the court's power to impose penal sentences within legislatively fixed limits have likewise been rejected in several noncapital cases. (*People* v. *Pryor,* 17 Cal.App.2d 147, 152; *In re O'Shea,*

11 Cal.App. 568, 572; *State* v. *Logan* (Ariz.) 493 P.2d 279, 280; *People* v. *Reid* (Ill.) 72 N.E.2d 812 [cert. den. 332 U.S. 776].)

Not Cruel Or Unusual Punishment

It is next contended that for various reasons the death penalty for first degree murder constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and section 6, article I, of the California Constitution.[6]

Numerous cases have rejected claims that the death penalty for first degree murder constitutes cruel and unusual punishment per se. (E.g. *Wilkerson* v. *Utah*, 99 U.S. 130; *People* v. *Thomas*, 65 Cal.2d 698, 708 [cert. den. 389 U.S. 868]; *People* v. *Bashor*, 48 Cal. 2d 763, 765; *People* v. *Lazarus*, 207 Cal. 507, 514; see *Trop* v. *Dulles*, 356 U.S. 86, 99 [plurality opinion]; 21 Am.Jur, 2d pp. 544-545, 553-555; 24B C.J.S., p. 555; 5 Wharton's Criminal Law and Procedure (1957) p. 424; Mosk, *The Eighth Amendment Rediscovered* (1968) Loyola L.A. L.Rev., pp. 20-22; see also *Francis* v. *Resweber*, 329 U.S. 459, 463-464 [plurality opinion].)

Petitioners urge us to reconsider the matter. They argue that the death penalty is cruel and unusual punishment because it "inflicts the loss of life without commensurate justification." They assert that life is a fundamental right, that before the state may restrict a fundamental

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[6] The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishment." This amendment is, of course, applicable to the states. (*Robinson* v. *California*, 370 U.S. 660.)

Section 6 of article I of the California Constitution provides, ". . . nor shall cruel or unusual punishment be inflicted."

right it must demonstrate a "compelling interest" in so doing, and that to show such an interest the state must establish that (1) the restriction imposed rationally relates to legitimate governmental objectives sought; (2) the benefit to the public far outweighs the impairment of the constitutional right, and (3) no alternative means less subversive of the constitutional right are available. Petitioners assert that the state's compelling interest is the punishment of criminals, that the proper functions of punishment are isolation, rehabilitation and deterrence, and do not include retribution (see *In re Estrada*, 63 Cal.2d 740, 745), and that isolation and rehabilitation can better be achieved by life imprisonment than execution. They offer to establish at an evidentiary hearing that the death penalty is not a more effective deterrent than life imprisonment. Petitioners cite cases applying a compelling interest test in contexts other than the question of the validity of a statute imposing a penalty for a crime. (E.g. *Sherbert* v. *Verner*, 374 U.S. 398, 406; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438-444; *Parrish* v. *Civil Service Commission*, 66 Cal.2d 260, 271.)

"The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual." (*People* v. *Tanner*, 3 Cal.2d 279, 298; *People* v. *Keller*, 245 Cal.App.2d 711, 714-715.) In *Trop* v. *Dulles*, *supra* (1958) 356 U.S. 86, 99 (plurality opinion), which concluded that denationalization for wartime desertion constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, it was stated, "[L]et us put to one side the death penalty as an index of the

constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Petitioners further argue that the death penalty is cruel and unusual in that it is imposed without standards and can be imposed regardless of extenuating circumstances. The absence of so-called standards has previously been discussed. It seems clear that the death penalty, which has been repeatedly upheld against claims that it constitutes cruel and unusual punishment per se,[1] does not become cruel or unusual as a result of the Legislature's vesting in the trier of fact discretion to extend mercy to a convicted first degree murderer.

In contending that the death penalty is unconstitutional, amici point to the statement in *Trop* v. *Dulles*, *supra*, 356 U.S. 86, 101, that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." An amicus curiae brief also contends that the death penalty violates the Eighth Amendment because it "drives men mad and to suicide." In support of these contentions amici point to testimony in *People* v. *Thornton*, Los Angeles Superior Court No. 328445, and to various documents. The matters pointed to do not disclose the percentage of prisoners on death row who during any recent period, as a result of being under the death sentence, attempted suicide or became insane. In any event, in a day when the death penalty "is still widely accepted, it cannot be said to violate the

[1] See authorities cited on page 25.

constitutional concept of cruelty." (See *Trop* v. *Dulles*, *supra*, 356 U.S. 86, 99 [plurality opinion].)

The fact that under Penal Code section 3604 the death penalty is inflicted by the administration of "a lethal gas" does not render the punishment cruel or unusual. (*People* v. *Daugherty*, 40 Cal.2d 876, 894 [cert. den. 346 U.S. 827; reh. den. 346 U.S. 880].)

A further contention is made that the "anguish of the 1,000 day wait on death row and the attendant deterioration of personality" renders the death penalty cruel and unusual. To support the assertion of such anguish and deterioration extracts from books and testimony in *People* v. *Thornton*, *supra*, Los Angeles Superior Court No. 328445, are set forth in an amicus brief. A similar contention was rejected in *People* v. *Chessman*, 52 Cal.2d 467, 498-499 (cert. den. 361 U.S. 925; pet. for reh. den. 361 U.S. 941). There the defendant was detained pending execution of sentence of death for more than 11 years during which period various matters of which he complained were litigated. He contended that such confinement constituted cruel and unusual punishment. We recognized that mental suffering undoubtedly attended his detention, indicated that there had not been unreasonable delay by California in the proceedings, and concluded that unconstitutionally cruel or unusual punishment had not been imposed.

Basic Due Process Not Violated

Amici next contend that, independently of the constitutional prohibition against cruel and unusual punishment, life is a fundamental right protected from state interference absent a compelling state interest, and they argue at length that the state cannot establish the existence of such an interest. They also suggest that under tests other

than that of a compelling state interest the death penalty violates due process. However, the fixing of penalties for a crime is a legislative function (*People* v. *Wade*, 53 Cal. 2d 322, 336; *People* v. *Tanner*, *supra*, 3 Cal.2d 279, 298; *People* v. *Quilon*, 245 Cal.App.2d 624, 629; *People* v. *Olson*, 173 Cal.App.2d 535, 536-537), and we will not nullify the legislative judgment as to the appropriate penalties for the heinous crime of first degree murder. It is for the Legislature and not this court to decide whether it is sound public policy to empower the imposing of the death penalty. (See *Robinson* v. *United States*, 324 U.S. 282, 286.)

Counsel For Indigent Defendants

Petitioners further contend that the due process and equal protection clauses of the United States Constitution confer upon indigent defendants in capital cases the right to appointed counsel throughout the period between the termination of their state appeals and their execution. They argue that the state must appoint counsel for such defendants to represent them with respect to appeals or petitions for certiorari to the United States Supreme Court, habeas corpus petitions to federal courts, and applications for executive clemency, and to institute and represent such defendants at sanity hearings conducted under Penal Code sections 3700 et seq.

Petitioners had counsel on appeal (*People* v. *Saterfield*, *supra*, 65 Cal.2d 752; *People* v. *Anderson*, *supra*, 64 Cal. 2d 633), and no claim is made that they were denied their right to counsel at any stage prior thereto. Their argument is directed to the post-state-appeal period, one which, of course, may be of many years duration as a result of a prisoner's litigating and relitigating his claims in various courts.

It is undisputed that petitions for certiorari were filed by petitioners in propria persona; that petitioners were

then, and are now, indigent; that Saterfield has a pending application for executive clemency; that, although Saterfield has counsel in the instant proceeding and a related one in a federal court, he is otherwise unrepresented by counsel; and that Anderson is now represented for all purposes by an attorney. This court has determined that the appointment of counsel to represent indigent defendants in capital cases in all proceedings between the termination of their state appeals and their execution, such as petitions for certiorari, habeas corpus petitions to state and federal courts, applications for executive clemency and the conduct of sanity hearings where indicated, will best serve the cause of justice, the interests of the defendants and this court. Counsel will be appointed routinely in the future in all such cases as a matter of policy.[1]

In view of this policy no purpose would be served by our giving further consideration to petitioners' claims for the services of counsel as a matter of right. Such services will be furnished these petitioners in keeping with such policy in any such proceedings in which they are not now represented by counsel.

Conclusion

Other contentions, exhaustively briefed and argued in the extensive and carefully prepared briefs of counsel and amici, are not relevant to the issues presented in these

[1] It should also be noted that under an amendment to Penal Code section 1239, effective the 61st day after the adjournment of the 1968 Regular Session, indigent capital defendants will have a statutory right to appointed counsel in certain proceedings. The amendment provides: "If the defendant [in a capital case] is unable to afford the services of counsel, the Supreme Court shall appoint counsel to represent him in any appeal to the Supreme Court, or any appeal or other review in the Supreme Court of the United States."

cases, or lack merit, or concern matters that may not arise upon the penalty retrials.

We denied petitioners' request for an evidentiary hearing relatig to their various contentions in December 1967. They have again requested such a hearing. That request is likewise denied.

Sections 190 and 190.1 were the result of an exercise by our Legislature of power vested in it by the Constitution and an exercise by the Governor of his power in approving the bills and making them "the law." To sustain the sections is to respect the actions of the two branches of our government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. It is, of course, our duty to strike down unconstitutional statutes, but we are not entrusted with their wisdom. The constitutionality of sections 190 and 190.1 has previously been upheld, and in our opinion properly so. Petitioners were found guilty of the heinous crime of first degree murder, and their judgments were affirmed.

Under the compulsion of *Witherspoon* v. *Illinois, supra,* 391 U.S. 510, the writs are granted as to the penalty trials. The remittiturs issued in Crim. 10126, *People* v. *Saterfield,* and Crim. 9317, *People* v. *Anderson,* are recalled and the judgments imposing the death penalty are reversed insofar as they relate to the penalty. In all other respects they are affirmed: Saterfield is remanded to the custody of the Orange County Superior Court and Anderson to the custody of the San Diego County Superior Court for new trials on the issue of penalty.

BURKE, J.

WE CONCUR:

MOSK, J.

SULLIVAN, J.

Appendix B

[*Concurring Opinion by Mosk, J.*]

I concur in the opinion of Justice Burke.

In my years as Attorney General of California (1959-1964), I frequently repeated a personal belief in the social invalidity of the death penalty, notably in testimony before California legislative committees in March 1959, July 1960, and April 1963.

Naturally, therefore, I am tempted by the invitation of petitioners to join in judicially terminating this anachronistic penalty. However, to yield to my predilections would be to act wilfully "in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled. . . ." (Frankfurter, *The* Supreme Court in the Mirror of the Justices (1957) 105 U.Pa. L.Rev. 781, 794.)

As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be. I conclude that Justice Burke has properly stated the current law of California and of every other American jurisdiction that has considered the problem.

Mosk, J.

[*Concurring and Dissenting Opinion by Tobriner, J.*]

I concur with the opinion of Justice Burke insofar as it holds that Witherspoon v. Illinois (1968) 391 U.S. 510, requires that we set aside the penalty previously imposed in the two cases now before us. I agree that indigent defendants in capital cases should be entitled to appointed counsel throughout the period between the termination of their state appeals and their execution. I submit, however, that sections 190 and 190.1 of the Penal Code of California violate the Fourteenth Amendment of the Constitution of

the United States because they provide no standards or tests whatsoever to enable judge or jury to decide why one convicted capital defendant should die and another should live. The California penalty trial leaves this vital decision to the unguided whim and caprice of the trier of fact; this irrational process, the antithesis of due process, has no place in the consitutional structure of American law.

The present petitions for habeas corpus require this court for the first time to conduct a full-scale inquiry into the constitutionality of the administration of the death penalty in California. Although the Legislature bears the responsibility for fixing the penalty for a given crime, we cannot avoid our own obligation to decide whether the present process of decreeing the penalty of death conflicts with the Constitution. The hard task of reaching such a decision must be a judicial one; we cannot evade it by saying it should be discharged by some other branch of government.

Two recent decisions of the United States Supreme Court, United States v. Jackson (1968) 390 U.S. 570, and especially Witherspoon v. Illinois, supra, 391 U.S. 510, compel us to reexamine the contention that the lack of prescribed standards in the administration of the death penalty takes the life of the capital defendant without the protection of due process and the equal protection of the laws. Our prior decisions have assumed that constitutional doctrines applicable to statutes regulating conduct and to the process of determining guilt did not govern statutes prescribing penalties; our cases predicated a constitutionally significant difference between these two types of statutes. We struck down as unconstitutional the regulation of conduct by statutes

that lacked ascertainable standards or that permitted arbitrary classification (see, e.g., In re Newbern (1960) 53 Cal.2d 786; People v. McCaughan (1957) 49 Cal.2d 409; Perez v. Sharp (1948) 32 Cal.2d 711) but we sustained the imposition of the penalty of death by statutes subject to such constitutional infirmity.

In *Jackson* and *Witherspoon* the United States Supreme Court for the first time adjudged the constitutionality of the procedure for imposition of the death penalty in light of constitutional doctrines traditionally applied to statutes proscribing conduct or involving the guilt-determination process. *Jackson* and *Witherspoon* therefore require us to reject the distinction implicit in our prior decisions between the death penalty procedure, on the one hand, and the guilt-determination process and statutes regulating conduct, on the other hand. Moreover, as we shall explain, *Witherspoon* makes clear that even if some forms of sentencing discretion differ in a constitutionally significant manner from guilt-determination processes, the imposition of the death penalty cannot be treated as simply another form of sentencing when it involves constitutional rights basic to procedural fairness. We must therefore consider afresh the constitutionality of the administration of the death penalty in California in light of the traditional line of cases holding that the due process and equal protection clauses of the Fourteenth Amendment protect against loss of a fundamental right—here, life itself—by an arbitrary power of decision.

In *Jackson*, the United States Supreme Court invoked the "overbreadth" doctrine,[1] traditionally a First Amend-

[1] The Supreme Court has traditionally applied the "overbreadth" doctrine in cases involving regulation of conduct protected by the

ment doctrine which the court applied to statutes regulating conduct, to nullify the penalty provision of the

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First Amendment. The requirement that statutes be not "overly broad" in their application, so that First Amendment liberties are not unnecessarily infringed, is typically stated in the following terms: "A statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 311. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488." (*Elfbrandt* v. *Russell* (1966), 384 U.S. 11, 18.)

The "overbreadth" doctrine, like the "void-for-vagueness" doctrine (see discussion of *Giaccio, infra*), prohibits loosely drawn statutes. The purpose of each differs, however. The former serves to prevent the state from needlessly interfering with protected rights when it can achieve its legitimate legislative purposes by a statute with a narrower application. The void-for-vagueness doctrine, on the other hand, seeks to prevent deprivation of fundamental rights by the imposition of a statute whose terms make its application uncertain. Both doctrines are often applicable, however, to the same statute. (See, e.g., Baggett v. Bullitt (1964), 377 U.S. 360, 366-373; NAACP v. Button (1963), 371 U.S. 415, 432-438.)

The Supreme Court relied upon two First Amendment cases applying the "overbreadth" doctrine in *Jackson:* Shelton v. Tucker (1960), 364 U.S. 479, and United States v. Robel (1967), 389 U.S. 258. *Shelton* held unconstitutional a state statute requiring every teacher to file annually an affidavit listing every organization to which he had belonged or regularly contributed during the preceding five years. Recognizing the propriety of the underlying state purpose, *Shelton* held only that the purpose could be achieved by a more narrowly drawn statute which would infringe less upon First Amendment rights.

Robel struck down a section of the 1950 Subversive Activities Control Act which provided that when a Communist-action organization is under a final order to register, it shall be unlawful for any member of the organization "to engage in any employment in any defense facility." (50 U.S.C., § 784(a)(1)(D).) The Supreme Court reasoned that the legitimate congressional purpose of "national defense" could be achieved by means less destructive of First Amendment rights.

Appendix B

Federal Kidnaping Act (18 U.S.C. §1201(a).)[1] The Supreme Court reasoned that the statute, in providing in effect that only a jury, and not a judge, could impose the death penalty, "needlessly *encourages*" waivers of jury trials and guilty pleas. (390 U.S. at p. 583.) The Supreme Court concluded that since Congress could accomplish its alleged "mitigating" purpose[2] in a manner more consonant with the constitutional rights of the capital defendant, the statutory procedure for imposing the death penalty violated the Constitution.

Although *Jackson* involved a federal statute and explicitly dealt with a penalty procedure which impaired

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[1] The statute provides that the convicted defendant "'shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.' This statute thus creates an offense punishable by death 'if the verdict of the jury shall so recommend.' The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty." (United States v. Jackson, supra, 390 U.S. 570, 571.)

Admittedly, our death penalty procedure does not involve this defect (as pointed out in Justice Burke's opinion, page 18, footnote 4). The importance of *Jackson* is not that the holding applies here, but that the rationale used by the court—a rationale which heretofore has been applied only in cases involving conduct as opposed to penalties—requires us to reconsider our prior decisions which necessarily assume that the constitutionality of the death penalty procedure is not to be tested by the same constitutional standards governing guilt-determining procedures and statutes which prescribe criminal conduct.

[2] "The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' We cannot agree." (United States v. Jackson, supra, 390 U.S. 570, 582.)

the right to a jury trial on the issue of guilt,[4] the rationale of *Jackson* bears upon the present issue for two major reasons. First, as pointed out above, *Jackson* rested on the constitutional doctrine of overbreadth, which has traditionally been applied only to statutes which regulate conduct. Indeed, the Supreme Court has traditionally invoked this doctrine to protect First Amendment rights as opposed to the rights of a criminal defendant encompassed in the Fourth, Fifth, Sixth, and Fourteenth Amendments. The two cases cited in *Jackson* to support the proposition that the death penalty cannot be constitutionally administered in a manner which "needlessly chill[s] the exercise of basic constitutional rights" (390 U.S. at p. 582), United States v. Robel, supra 389 U.S. 258, and Shelton v. Tucker, supra 364 U.S. 479 (see fn. 1, supra), both involved the extent to which, respectively, Congress and a state could, consistently with the First Amendment, prohibit or require certain conduct as a condition of public employment. *Jackson*, on the other hand, like the present case, involves a statute prescribing a procedure for imposing the death penalty which was attacked on the ground that such procedure unduly infringed the rights of a criminal defendant.

Secondly, *Jackson* expressly rejected the argument that the procedure for the imposition of the death penalty escaped constitutional attack on the ground that the statutory scheme for an alternative penalty of life imprisonment "operates 'to mitigate the severity of [capital] punishment.'" (390 U.S. at p. 582.) In response to the

[4] Cf. Duncan v. Louisiana (1968), 391 U.S. 145, holding that the due process clause of the Fourteenth Amendment "incorporates" the Sixth Amendment right to a trial by jury in state criminal cases.

government's contention that the procedure should be upheld because Congress thereby dispensed mercy through the jury by providing an alternative penalty to death for capital offenders, the Supreme Court stated: "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel*, 389 U.S. 258; *Shelton* v. *Tucker*, 364 U.S. 479, 488-489. . . . The Congress can of course mitigate the severity of capital punishment. . . . [But] whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." (390 U.S. at pp. 582-583.)

Jackson's explicit rejection of the government's attempt to justify the death penalty procedure prescribed by the Federal Kidnaping Act thus exposes the fallacy of the statement in Justice Burke's opinion that "[a] statute *mitigating capital punishment* is not essentially unfair to the wrongdoer for failure to specify standards for the exercise of that discretion." (Italics added.) (Ditto opn., pp. 17-18.) Of course, sections 190 and 190.1 may, like the Federal Kidnaping Act, "have as an objective the avoidance of 'the more drastic alternative of mandatory capital punishment in every case. . . .'" (Ditto opn., p. 18.) But to infer that the procedure prescribed by sections 190 and 190.1 may withstand any constitutional scrutiny because they "'may be viewed as ameliorating the severity of the more extreme punishment that Congress [or the state Legislature] might have wished to provide'" rests on a basic misunderstanding of the *Jackson* decision.

Appendix B

The statement from *Jackson* quoted by the majority[5] must be read in light of the immediately succeeding paragraph in which the Supreme Court states: "The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' *We cannot agree. Whatever might be said of Congress'* [or in this case the state Legislature's] *objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.* . . . The Congress [or the state Legislature] can of course mitigate the severity of capital punishment. . . . But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial [i.e., without a procedure impairing fundamental constitutional rights] . . . [I]t is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified by its ostensible purpose." (Italics added.) (390 U.S. at p. 582.)

Jackson thus teaches that irrespective of the propriety of the death penalty itself or the provision of an alternative penalty to "mitigate the severity of capital punishment," we must examine the *procedure* for imposition of the penalty. We must determine whether that procedure deprives capital defendants of fundamental rights inherent in the administration of criminal justice.

Witherspoon, even more than *Jackson*, makes clear that death penalty procedures must comply with basic strictures

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[5] The death penalty procedure prescribed by the Federal Kidnaping Act "avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." (390 U.S. at pp. 581-582; ditto opn., p. 18.)

of the Fourteenth Amendment. *Witherspoon's* holding that the penalty jury must be *composed* in a manner consonant with the due process clause requires that we consider whether the penalty jury *functions* in a manner consonant with due process.

The Supreme Court in *Witherspoon* stated: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a *tribunal so selected.*

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without *due process of law.*" (Italics added; fns. omitted.) (391 U.S. at pp. 521-523.)

In determining whether a death sentence imposed by a tribunal that functions without prescribed standards deprives the capital defendant "of his life without due process of law," we must heed the Supreme Court's explanation in *Witherspoon* of the unique function that such a tribunal performs.

"It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois [as does the State of California under sections 190 and 190.1 of the Penal Code] empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the

defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require 'that there be taken into account the circumstances of the offense together with the character and propensities of the offender,' *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241. *But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct.*" (Italics added.) (391 U.S. at p. 521, fn. 20.)

Witherspoon therefore squarely stands for the proposition that the requirements of the Fourteenth Amendment —those that go to the very fairness and integrity of the penalty-determining process—apply to the procedure pursuant to which the state, be it by judge or jury, takes the life of a capital offender. *Witherspoon* holds that the exclusion of veniremen for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" violates the "basic requirements of procedural fairness" demanded by the Fourteenth Amendment. Similarly, we must now recognize that a tribunal endowed with unbridled discretion to determine whether a convicted capital defendant shall live or die cannot constitutionally administer the death penalty.

Although the discretionary imposition of the death penalty has long been practiced, no length of uncritical history or mindless tradition may sanction a procedure when "the

constitutionality of the course pursued has . . . been made clear." (Erie R. Co. v. Tompkins (1938) 304 U.S. 64, 77-78; see also, Malloy v. Hogan (1964) 378 U.S. 1, 5; Brown v. Board of Education (1954) 347 U.S. 483, 492-495; Perez v. Sharp, supra, 32 Cal.2d 711, 727.) Chief Justice Warren has said: "when society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. . . . The methods we employ in the enforcement of our criminal laws have aptly been called the measures by which the quality of our civilization may be judged." (Coppedge v. United States (1962) 369 U.S. 438, 449; Douglas v. California (1963) 372 U.S. 353, 357 fn. 2.)

The long span of guideless imposition of the death penalty is no justification for it. If there has been error, its repetition here cannot condone it. The longevity of an erroneous constitutional interpretation is no ground for its preservation.

We begin by reviewing the nature of the procedure under which convicted capital defendants are condemned to death or permitted to live.

I. *Sections 190 and 190.1 of the Penal Code confer absolute discretion on the trier of fact and thereby require the trier of fact to perform a sui generis function which subjects the convicted capital defendant to a power of arbitrary decision.*

Section 190 of the Penal Code provides that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court o jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1." Section 190 does not articulate any purpose or prescribe any standards to guide the trier of fact

in its determination of the penalty. Section 190.1 provides that at the penalty trial, "evidence may be presented . . . of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented."

Section 190.1 does not explain which circumstances or background facts should be considered as aggravating and which as mitigating, nor the extent of aggravation or mitigation necessary, for the imposition or withholding of the ultimate penalty. Indeed, we have previously held that the section does not require the jury to give any effect at all to evidence of either aggravating or mitigating circumstances. "The jury does not have to find ameliorating circumstances to impose life imprisonment, nor need it find aggravation to impose the death penalty. The choice between the two rests in the absolute discretion of the jury." (People v. Hamilton (1963) 60 Cal.2d 105, 136; see also People v. Lane (1961) 56 Cal.2d 773, 786.)

Pursuant to these rulings the jury is currently instructed that "it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other. . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion. . . . Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the

jury." (CALJIC (1967 Cumulative Pocket Part) No. 306.1, at p. 128.)

Although the Legislature, in establishing the alternative punishments of death and life imprisonment for first degree murder, must have considered that some capital offenders deserved the ultimate penalty while others should be sentenced to life imprisonment, it did not prescribe any standards to guide the trier of fact in making that critical classification.[1] Thus in past decisions we have construed sections 190 and 190.1 to vest in the trier of fact an "absolute" discretion to determine whether the particular convicted capital defendant should properly be punished by death or life imprisonment. (E.g., People v. Hines (1964) 61 Cal.2d 164, 168-169; People v. Mason (1960) 54 Cal.2d 164, 169; People v. Green (1956) 47 Cal.2d 209, 232; Comment, *The California Penalty Trial* (1964) 52 Cal.L.Rev. 386, 389.)

The decisions applying sections 190 and 190.1 describe the "absolute" nature of the discretion presently vested in the trier of fact during the penalty trial. That discretion is not only unguided and unlimited, its exercise is not even subject to review on the question of abuse. (People v. Odle (1951) 37 Cal.2d 52, 57-59; see also People v. Ortega (1953) 41 Cal.2d 621, 622; People v. Harrison (1953) 41 Cal.2d 216, 219; People v. Thomas (1951) 37 Cal.2d 74, 78; People v. Danielly (1949) 33 Cal.2d 362, 383; People v. Tuthill (1948) 32 Cal.2d 819, 827.)

This absolute discretion imposes on the trier of fact an "onerous task" (People v. Friend (1957) 47 Cal.2d 749,

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[1] Comment, *Scope of Appellate Review of Sentences in Capital Cases* (1960), 108 U.Pa.L.Rev. 434, 444; see generally, Knowlton, *Problems of Jury Discretion in Capital Cases* (1953), 101 U.Pa. L.Rev. 1099.

765) which is totally unlike its normal duties. "The jury's task assumes formidable proportions because it transcends the usual function of finding whether or not certain events occurred and certain consequences resulted from them. The jury in this instance performs no such circumscribed task; it must in each particular case, depending wholly on the kind of defendant and nature of facts before it, decide the issue of life or death. In reaching its crucial decision, although Penal Code section 190.1 states it may consider 'facts in aggravation or mitigation of the penalty,' the jury had no guidelines, no standards, no criteria." (People v. Morse (1964) 60 Cal.2d 631, 643.) "In all other situations than the penalty trial the jury deliberates under the court's instructions and reaches its verdict within the area delineated by the judge. . . . In all other situations than the penalty trial the evidence must be narrowed down to the point at issue; . . ." (People v. Hines, supra, 61 Cal.2d 164, 168-169.)

As a result of this vesting of "absolute" discretion in the trier of fact and the consequent destruction of the procedural safeguard of review, the penalty jury "may conceivably rest the death penalty upon any piece of introduced data [or upon no evidence whatsoever]. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner." (People v. Hines, supra, 61 Cal.2d at p. 169.)

We shall now explain that the entire fate of an individual human being—the basic question whether he shall live or die—cannot constitutionally be subjected to an unguided and unlimited power of arbitrary decision.

Appendix B

II. ***Imposition of the death penalty in the absence of any prescribed standards deprives the capital defendant sentenced to death of his life without due process of law in violation of the Fourteenth Amendment.***

Nothing could be more basic to the due process clause or to the requirement of procedural fairness (see Witherspoon v. Illinois, supra, 391 U.S. 510, 251, fn. 20) than that a person not suffer the arbitrary deprivation of his life or liberty. The constitutional imperative that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards is central to our administration of criminal justice. The absence of any standards to circumscribe the trier of fact's discretion under sections 190 and 190.1 of the Penal Code to determine whether a convicted capital defendant shall suffer death or life imprisonment therefore deprives the capital defendant condemned to death of his life without due process of law.

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law." (In re Newbern, supra, 53 Cal.2d 786, 792; Winters v. New York (1948) 333 U.S. 507, 509-510, 515.) The constitutional requirement for certainty in the criminal law serves to protect two basic sets of rights deemed fundamental to the administration of criminal justice. The first is crystallized in the constitutional concept of "notice";[1]

[1] Conviction under a statute which fails "to give fair notice of what acts will be punished . . . violates an accused's rights under procedural due process . . ." (Winters v. New York, supra, 333 U.S. 507, 509-510.) "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon

the second in the demand for procedural safeguards and an opportunity for meaningful review.[8]

A criminal law which is not framed in terms of sufficiently ascertainable standards violates the due process clause in the first instance because it fails to give adequate warning of its own proscription. (Winters v. New York, supra, 333 U.S. 507, 509-510, 515.) Correlatively, in order to protect the accused's right to "a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial," he cannot constitutionally be convicted without being "advised of the charges against him." (In re Hess (1955) 45 Cal.2d 171, 175; Cole v. Arkansas (1948) 333 U.S. 196, 201.) Thus, in Powell v. Alabama (1932) 287 U.S. 45, 68, the Supreme Court found that "it never has been doubted by this court, or any other so far as we know, that notice and hearing

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civil sanction for enforcement. . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." (*Id.* at p. 515.)

"'It is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will.' [Citations.]" (Perez v. Sharp, supra, 32 Cal.2d 711, 728.)

[8] Although the due process clause does not require a state to provide an appeal from a criminal conviction, nevertheless, when the state does provide such an appeal it cannot sanction procedures which render that appeal meaningless or deprive one class of convicted defendants of the opportunity to secure redress for an incorrect application of the law to them. (Griffin v. Illinois (1956), 351 U.S. 12, 18; Frank v. Mangum (1915), 237 U.S. 309, 327.)

Conviction under a procedure which prevented "an appellate court [from reviewing] the facts and law of a case and intelligently decid[ing] whether the findings of the lower court are supported by evidence . . . would be a denial of due process." (Garner v. Louisiana (1961), 368 U.S. 157, 173.)

are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . In *Holden* v. *Hardy* [(1898)] 169 U.S. 366, 389 [for example] the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' . . . Citations to the same effect might be indefinitely multiplied. . . ."

Secondly, a criminal law lacking a sufficiently ascertainable meaning precludes administration pursuant to constitutionally required procedural safeguards. The lack of ascertainable standards denies the accused a meaningful defense and prevents judicial control and review of the relevancy and sufficiency of the evidence to establish a violation of the law. (Cf. Garner v. Louisiana, supra, 368 U.S. 157, 163-164; Thompson v. Louisville (1960) 362 U.S. 199, 206.) "The objectionable quality of vagueness [in criminal statutes affecting fundamental rights depends] upon the danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application." (NAACP v. Button, supra, 371 U.S. 415, 432-433.) Since an accused faced with a charge of violation of such a law can neither adequately prepare a defense to that charge nor protect his rights by seeking judicial review on the ground that the law was incorrectly or arbitrarily applied to him, "'it is a fundamental rule that no citizen should be deprived of his liberty [or his life pursuant to] a law which is uncertain and ambiguous.' [Citations.]" (Perez v. Sharp, supra, 32 Cal.2d 711, 728; see also, In re Oliver

(1948) 333 U.S. 257, 273, 278; Chambers v. Florida (1940) 309 U.S. 227, 236-237.)[9]

Sections 190 and 190.1 of the Penal Code contain both vices of unconstitutionally vague laws which the due process clause prohibits. First, although the offenses for which a person may suffer the death penalty are clearly prescribed, the circumstances under which a person may receive that penalty rather than life imprisonment remain totally unclear. We must assume that in establishing the alternative punishments of death and life imprisonment rather than setting down one mandatory punishment, the Legislature concluded that not all capital offenders should be punished by the extreme penalty. "The very provision of alternatives presupposes a rational means of distinguishing between those alternatives." (Comment. *Scope of Appellate Review of Sentences in Capital Cases,* supra, 108 U.Pa.L.Rev. 434, 444.) Yet the current administration of the death penalty, by failing to provide criteria suffi-

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[9] "[D]ue process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.

"Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness; a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same —to test application of rules to particular situations." (Note, *Due Process Requirements of Definiteness in Statutes* (1948), 62 Harv. L.Rev. 77-78.)

ciently ascertainable to guide courts and juries in making that distinction, prevents a convicted capital defendant from knowing how to show that he falls within the class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment.

Secondly, and more crucially here, the complete absence of standards in the administration of the death penalty deprives the convicted capital defendant of any way to protect himself against an arbitrary imposition of the death penalty. Since no limitations bound the exercise of the discretion of the trier of fact, the defendant can neither challenge the evidence introduced during the penalty trial on the ground of insufficiency nor seek review on the ground of the erroneous application of the death penalty to him. The epitome of the vice of absence of procedural safeguards inherent in vague and standardless statutes thus permeates the administration of the death penalty: the defendant sentenced to death cannot even show that an ad hoc group of 12 jurors or a judge exercising absolute power over his life abused this discretion. Sections 190 and 190.1 thus deny due process of law because they provide no standards by which an abuse of discretion by the trier of fact can be curbed or even subjected to review. The power of the trier of fact to decree the death sentence is as broad and arbitrary as it is absolute and untouchable.

The contention in Justice Burke's opinion that the trial judge's duty to redetermine the issue of penalty on the motion for a new trial by a capital defendant sentenced to death constitutes a "safeguard . . . against any possibility of arbitrary action" (ditto opn., p. 13) ignores the fact that the judge suffers the same lack of standards as does the jury. Since there are no criteria according to which the judge must decide the propriety of the jury's

imposition of the death penalty, the capital defendant cannot know how to argue either to the trial judge that the jury has improperly applied the death penalty in his case, or to the reviewing court that the trial judge has improperly failed to reduce the penalty decreed by the jury. Far from constituting a "safeguard," the trial judge's standardless discretion to accept or reject the jury's imposition of the death penalty subjects the defendant to a two-level power of arbitrary decision.[10]

We shall now point out that the United States Supreme Court has specifically applied the due process prohibition of vague and standardless statutes to the fixing of punishment and sanctions. Thus the "void-for-vagueness" doctrine (see generally, Note, *The Void for Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa. L.Rev. 67) cannot be limited to that portion of the criminal law which regulates and proscribes conduct. It applies equally to that part of the law which defines punishments for those who have

[10] The similar suggestion in Justice Burke's opinion that the Governor's clemency power constitutes a "safeguard" against the possibility of an arbitrary imposition of the death penalty (ditto opn., p. 14) likewise rests on a misunderstanding of the constitutional prohibition of laws authorizing arbitrary deprivations of fundamental rights. First, in the absence of any standards, the Governor, as well as an appellate court, cannot determine the basis, and therefore the propriety, of the trier of fact's imposition of the death penalty. Secondly, and more importantly, the clemency power is an extraordinary authority which operates outside the judicial system. (Symposium, Evolving Post-Conviction Procedures, *Executive Clemency in Capital Cases* (1964), 39 N.Y.U. L.Rev. 136, 177-178; Editorial, *Executive Clemency* (1967), 55 Cal.L.Rev. 412, 413-414.) The Governor exercises his power, not to make legal corrections within the judicial administration of the criminal law, but to alter the outcome of the judicial process on the basis of extra-legal considerations. The very character of the clemency power presupposes that the death penalty has been constitutionally applied to the condemned man.

been accused or convicted of engaging in criminal conduct. (Cf. Witherspoon v. Illinois, supra, 391 U.S. 510, 521, fn. 20.)

In Giaccio v. Pennsylvania (1966) 382 U.S. 399, the Supreme Court held that a standardless statute which authorized the jury to assess costs against acquitted defendants, and which imposed a threat of imprisonment for nonpayment of the costs, violated the due process clause of the Fourteenth Amendment. The following reasoning in *Giaccio* applies to the present administration of the death penalty.

"[T]he 1860 Act [giving complete discretion to the jury to determine whether an acquitted defendant shall be liable for the costs of prosecution] is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs. . . .

"It is well established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards,* what is prohibited and what is not in each particular case. [Citations.] This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. . . . *Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the promise that the*

law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement." (Italics added.) (Giaccio v. Pennsylvania, supra, 382 U.S. 399, 402-403.)

The Supreme Court exposed the constitutional infirmity in the trial court's interpretation of the statute, expressed in its instruction, that the jury could impose costs on an acquitted defendant if it found him guilty of "'some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] his misconduct has given rise to the prosecution.'" Speaking for the majority Justice Black said, "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' . . . If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. And these terms are no more effective to make a statute valid which standing alone is void for vagueness." (*Id.* at p. 404.) *Giaccio* thus makes clear that the void-for-vagueness doctrine is not limited to laws regulating conduct or prescribing guilt-determination procedures, but rather applies as well to criminal statutes stipulating penalties and the procedure for their imposition.

That *Giaccio* involved an acquitted defendant does not render the decision inapposite here. The two concurring Justices, Stewart and Fortas, would have explicitly rested the decision on the narrow ground that the due process clause prohibits a state from imposing a penalty on an accused whom the jury has found not guilty of the offense

charged. (*Id.* at p. 405.) Justice Black, speaking for himself and five other Justices, however, nowhere attaches any importance to the fact of acquittal; he makes clear that the vice of the statute (and its application by the trial court pursuant to instructions formulated in terms of "misconduct") lies in its "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." (*Id.* at p. 402.) *Giaccio* therefore stands at least for the proposition that a jury may not be given absolute discretion to determine whether a defendant will or will not receive a specific type of penalty.

We cannot agree with the position taken in Justice Burke's opinion (see ditto opn., p. 18) that the Supreme Court's reference to jury discretion under indeterminate sentencing laws in footnote 8 of the opinion renders *Giaccio* inapplicable to the present issue. In footnote 8 the court states: "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." (*Id.* at p. 405.)

First, footnote 8 demonstrates the court's recognition that the majority rationale does apply to the question of the constitutionality of jury discretion in sentencing. Second, the footnote disclaims no more than the general implication that the decision automatically renders *all* jury discretion in sentencing unconstitutional; the footnote, that is, merely states that *some* jury discretion in sentencing is consistent with the demands of the due process clause.

Finally, and most importantly, the footnote refers to those state practices leaving to the jury the discretion to fix punishment "within legally prescribed limits." (*Id.* at

p. 405, fn. 8.) Footnote 8 thus relates to those sentencing procedures in which the jury performs a function similar to that performed by the Adult Authority (Pen. Code, §§1168, 3020-3024.5, 5075-5082) and the trial judge (e.g., Pen. Code, §§17, 1203) in California.[11] The purpose of footnote 8, then, was to indicate that the decision did not cast doubt upon the constitutionality of typical indeterminate sentencing procedures in which a jury—or a judge or administrative body—exercises discretion, *within legally prescribed limits*, to determine the extent of the incarceration of convicted defendants.[12]

The United States Supreme Court expressly recognized in *Witherspoon* that the penalty determination in a capital case does not constitute a typical form of sentencing discretion. *"It should be understood that much more is involved here than a simple determination of sentence."* (Italics added.) (391 U.S. 510, 521, fn. 20.) *Witherspoon* thus requires that we reexamine our prior decisions in People v. Hill (1967) 66 Cal.2d 536, and People v. Seiterle (1966) 65 Cal.2d 333. These cases erroneously declared that *Giaccio* exempted *all* forms of sentencing discretion, regardless of the nature of the choice or the penalties involved, from the holding of that case that a jury cannot constitutionally impose a penalty in the absence of standards.

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[11] A minority of states leave the function of fixing punishment within the statutory limits to the jury rather than to the trial judge or an administrative body. On the jury's sentencing discretion in felony cases generally, see Note, *Statutory Structures for Sentencing Felons to Prison* (1960), 60 Colum.L.Rev. 1134, 1154-1157.

[12] We explain in the fourth part of our discussion, *infra*, that unconstitutionality of the penalty trial because of the absence of standards does not cast into doubt the constitutionality of the clearly distinguishable sentencing discretion exercised by the trial judge in California in non-capital cases.

Appendix B

III. *The absence of any prescribed standards in the administration of the death penalty deprives the capital defendant sentenced to death of his right to equal protection of the laws in violation of the Fourteenth Amendment.*

Insofar as they both interdict arbitrary laws and procedures, the equal protection and due process clauses of the Fourteenth Amendment overlap. The "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' *Chambers* v. *Florida* (1940) 309 U.S. 227, 241." (Griffin v. Illinois, supra, 351 U.S. 12, 17; Douglas v. California, supra, 372 U.S. 353, 356-358; Truax v. Corrigan (1921) 257 U.S. 312, 331-333; Yick Wo v. Hopkins (1886) 118 U.S. 356, 367-368.)

The unguided discretion of the trier of fact to decide that a convicted capital defendant shall suffer death rather than life imprisonment violates the basic guarantee of the equal protection clause that the legal process must provide for evenhanded justice. (McLaughlin v. Florida (1964) 379 U.S. 184, 194; Skinner v. Oklahoma (1942) 316 U.S. 535, 541; Yick Wo v. Hopkins, supra, 118 U.S. 356, 369.) Such discretion also violates the essential corollary of this proposition that a statute abridges this guarantee if it confers upon the jury "a naked and arbitrary power" to impose a criminal penalty on the basis of any principle or no principle. (Yick Wo v. Hopkins, supra, 118 U.S. at p. 366.)

Appendix B

The equal protection clause prohibits the arbitrary selection of a class of individuals for the imposition of a special burden. It requires as a minimum that legislative classifications be rationally related to a legitimate governmental purpose. (Loving v. Virginia (1967) 388 U.S. 1, 8-9; Rinaldi v. Yeager (1966) 384 U.S. 305, 308-309; Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 233; Perez v. Sharp, supra, 32 Cal.2d 711, 714.) "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same" (Tigner v. Texas (1940) 310 U.S. 141, 147) or prohibit "legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated." (Barbier v. Connolly (1885) 113 U.S. 27, 32.) "But arbitrary selection can never be justified by calling it classification." (Gulf, Colorado & Santa Fe Ry. Co. v. Ellis (1897) 165 U.S. 150, 159; McLaughlin v. Florida, supra, 379 U.S. 184, 190.)

The mandate of the equal protection clause that the law "affect alike all persons similarly situated" requires that classifications imposing different treatment on selected groups of persons derive, not from whim or caprice, or hostility or favoritism towards particular individuals or groups, but from legitimate legislative objectives. (Truax v. Corrigan, supra, 257 U.S. 312, 332-333; see generally Tussman & tenBroek, *The Equal Protection of the Laws* (1949) 37 Cal.L.Rev. 341, 344-347, 357-361.) When such a classification does not bear at least a rational relation to a legitimate legislative purpose, or when the legislation fails to reveal any legitimate purpose in relation to which the classification can be justified, then the legislation fails because it creates an "invidious discrimination." (McLaughlin v. Florida, supra, 379 U.S. 184, 190, 194; Douglas

v. California, supra, 372 U.S. 353, 356; Skinner v. Oklahoma, supra, 316 U.S. 535, 541.)

In order to determine whether legislative classifications imposing special burdens create an invidious discrimination and thus run afoul of the equal protection clause, we must consider not only the basis of the classification and the purported justifying legislative purpose but also the nature of the legislation and the area of human conduct it regulates. (Smith v. Cahoon (1931) 283 U.S. 553, 567; Tussman & tenBroek, supra, 37 Cal.L.Rev. 341, 372-373.) In cases involving economic regulations, "the Court has merely asked whether there is any rational foundation for the discrimination, and has deferred to the wisdom of state legislatures." (Loving v. Virginia, supra, 388 U.S. 1, 9.) But in cases in which "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 670.)[18]

Thus, in Skinner v. Oklahoma, supra, 316 U.S. 535, the United States Supreme Court struck down as violative of the equal protection clause the Oklahoma Habitual Criminal Sterilization Act because it included within the class

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[18] A law involving a "fundamental" right (e.g., the right to vote or the right to marry) or employing a "suspect" classification (e.g., race or ancestry), "even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." (McLaughlin v. Florida, supra, 379 U.S. 190, 196; see also, e.g., Loving v. Virginia, supra, 388 U.S. 1 (right to marry); Baxstrom v. Herold (1966), 383 U.S. 107 (right to a hearing before civil commitment at expiration of a prison sentence); Cox v. Louisiana (1965), 379 U.S. 536 (right to freedom of speech); Perez v. Sharp, supra, 32 Cal.2d 711 (right to marry).)

of three-time felons subject to the act those guilty of larceny but arbitrarily excluded those guilty of embezzlement. The following reasoning of the Supreme Court in *Skinner* directly applies to the question whether the state may constitutionally confer upon a jury the absolute discretion to decide that a convicted capital defendant shall be deprived of his life rather than undergo impairment of his liberty by imprisonment for life: "[I]f we had here only a question as to a State's classification of crimes, such as embezzlement or larcency, no substantial federal question would be raised. . . .

"But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with *legislation which involves one of the basic civil rights of man. . . . There is no redemption for the individual whom the law touches.* Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters . . . merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, *lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals* in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo* v. *Hopkins,* [supra] 118 U.S. 356, 369. *When the law lays an unequal hand on those who have committed intrinsically the same quality of offense* and sterilizes one and not the other, it has made as . . . *invidious a discrimination* as if it had selected a particular race or nationality for oppressive treatment." (Italics added.) (316 U.S. at pp. 540-541.)

Appendix B

The present adminstration of the death penalty in California constitutes an even more flagrant violation of the defendant's right to equal protection of the laws than the procedures under Oklahoma's Habitual Criminal Sterilization Act in *Skinner*. Here the defendant suffers not only an irreparable deprivation of his right to procreate; he suffers a deprivation of *all* "the basic civil rights of man," even life itself. Here, as in *Skinner*, we have "no redemption for the individual whom the law touches." We must therefore follow the constitutional mandate and "strictly scrutinize" the distinction which the state permits the trier of fact to draw between those convicted capital defendants who receive the death penalty and those who suffer life imprisonment, "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."

The The "strict scrutiny" required by *Skinner* is not necessary to reveal the inherent invidious discrimination against those capital defendants who receive the death penalty as distinguished from those who receive life imprisonment. In *Skinner*, the distinction rested on an arbitrary classification which permitted invidious discrimination; here, the distinction rests on no classification at all. In a comparable legal situation, in a case not involving the awful penalty of death but the granting of a permit to exhibit motion picture film, we very recently held an ordinance unconstitutional because it totally lacked standards. In Burton v. Municipal Court (1968) 68 A.C. 720, 728, pointing to the decisions holding unconstitutional statutes and ordinances with inadequate standards, we said: "*A fortiori* an ordinance is unconstitutional *if no standards*

whatever are set forth to circumscribe the discretion of officials in granting or denying licenses. [Citations.]" (Italic added.)

The procedure under sections 190 and 190.1, providing no classificatory criteria whatsoever, permits the trier of fact *arbitrarily* to determine whether particular convicted capital defendants should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that different treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular convicted capital defendants sentenced to death rather than life imprisoment, sections 190 and 190.1 make "as . . . invidious a discrimination" against those upon whom the trier of fact imposes the death penalty "as if [they] had selected a particular race or nationality for [that] oppressive treatment." (Skinner v. Oklahoma, supra, 316 U.S. 535, 541.) "It is clearly unconstitutional to enable a public official [let alone an ad hoc group of 12 individuals] to . . . engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary . . . power." (Cox v. Louisiana, supra, 379 U.S. 536, 557; Yick Wo v. Hopkins, supra, 118 U.S. 356, 366-363). Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold "a naked and arbitrary power" to make invidious discriminations against another. (Yick Wo v. Hopkins, supra, 118 U.S. at pp. 366-368.)

To meet the above propositions, Justice Burke's opinion (ditto opn., pp. 15-17) cites a number of cases from other jurisdictions which we do not find persuasive. Only two of the cases involving the lack-of-standards contention were decided after *Witherspoon* and *Jackson:* Maxwell v. Bishop (8th Cir. 1968) 398 F.2d 138, and State v. Forcella (N.J. 1968) 245 A.2d 181. The court in *Maxwell,* rejecting a constitutional challenge to the Arkansas statute, was "not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. . . . [The jury's] choice between capital punishment and life imprisonment . . . is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge." (398 F.2d at p. 149.) But as we shall explain in part IV, *infra,* the gravity of the decision rendered at the penalty trial as contrasted with the consequences of other sentencing decisions results in a constitutionally significant difference between these decisions.

In *Forcella* the New Jersey Supreme Court declined to overrule its earlier opinion in State v. Johnson (N.J. 1961) 168 A.2d 1, app. dism. 368 U.S. 145, cert. den. 368 U.S. 933 (discussed *infra*). It suggested that the statute relating to the death penalty did not lend itself to "specific standards"; that "although the Constitution may require a standard whenever one is feasible and serviceable, it cannot follow that government must be denied all powers which defy a definitive statement of the basis of their exercise"; hence the matter must be resolved by "a sound discretion." (State v. Forcella, supra, 245 A.2d 181, 194.) But, as we shall set out in more detail *infra,* due process requires that death not be dealt out irrationally and with-

out standards; due process requires reasoned justice; if society or the Legislature cannot "feasibly" set out tests as to why one capital offender should die and the other live, the unresolved issue should not be foisted upon the trier of fact so that it inevitably must decide the issue arbitrarily. Due process can never be sacrificed upon the altar of the difficulty of its articulation; reasoned justice should not be abandoned to chance.

In another lack-of-standards case cited in Justice Burke's opinion, Chatterton v. Dutton (Ga. 1967) 154 S.E.2d 213, cert. den. 389 U.S. 914, the Georgia court, in holding that the absence of standards did not deny due process to the capital defendant, merely quoted the United States Supreme Court as stating that: "The requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." (154 S.E.2d 213, 215.) That sentence is taken out of context from Minder v. Georgia (1902) 183 U.S. 559, 562. In the latter case the defendant argued not that the manner in which the law would affect him emanated from an arbitrary and unlimited discretion, but that the state statute violated the equal protection clause because it differed from the statutes in force in other states. In dismissing the equal protection clause contention, the *Chatterton* court merely reiterated the non sequitur that since all defendants convicted of first degree murder are subject to the same penalty procedure, the law treats alike all those within the same class.

The "reasoning" of the Georgia court in *Chatterton* begs the question by refusing to recognize that the issue

is whether the class of capital offenders may be arbitrarily *subclassified* into the classes of those who do and those who do not suffer death as the penalty. Offering no logical rationale for the rejection of petitioners' Fourteenth Amendment claims, *Chatterton* cannot therefore be relied upon as authority for the proposition that a procedure which vests arbitrary power in the trier of fact to determine the question of life and death does not run afoul of the Fourteenth Amendment.

An additional federal case rejecting the lack-of-standards contention which Justice Burke's opinion cites, In re Ernst's Petition (1961) 294 F.2d 556, 560-561, rests upon three bases that we cannot accept. The first is its reliance upon tradition to uphold the absolute discretion of the jury in sentencing. As we explained supra, however, the longevity of a practice can never insulate it from constitutional scrutiny; "due process" is an evolving concept which is subjected to continuous re-analysis in light of society's development and maturation. (Wolf v. Colorado (1949) 338 U.S. 25, 27; see also, Pointer v. Texas (1965) 380 U.S. 400, 403-406; Malloy v. Hogan, supra, 378 U.S. 1, 4-6; Gideon v. Wainright (1963) 372 U.S. 335, 339; Rochin v. California (1952) 342 U.S. 165, 168-172; see generally, Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism* (1957) 66 Yale L.J. 319.)

The second basis of *Ernst* rests upon the Supreme Court's apparent prior approval of a federal penalty provision applicable to defendants convicted of first degree murder which is analogous to the provision struck down in *Jackson*. The third basis—that the delegation of discretion to the jury to decide life or death allows a mitigation of the severity of capital punishment—was ex-

plicitly rejected as a justification for an unconstitutional penalty procedure in *Jackson*.

The oldest federal case relied upon in Justice Burke's opinion, Ex parte Sullivan (9th Cir. 1936) 83 F.2d 796, 798, offers us no more than the bare statement: "Appellant contends that the submission to the jury of the question whether or not the defendant, in the event he was convicted of first degree murder, should be sentenced to life imprisonment or to death was a violation of his rights under the Fourteenth Amendment to the Constitution of the United States. There is no merit in this contention." (Cf. People v. Mason, supra, 54 Cal.2d 164, 169, and other cases discussed *infra*, at fn. 14.)

State v. Latham (Kan. 1962) 375 P.2d 788, 798-799, cited in Justice Burke's opinion, rejects the equal protection point on the ground that the question of the proper penalty must be and was resolved by the Legislature, and reads standards into a statute which literally confers complete discretion. *Latham* contains no discussion, however, of why a provision for absolute discretion in determining the penalty in capital cases *without any standards* does not subject the capital defendant to a power of unconstitutional and arbitrary decision. To answer the lack-of-standards contention in terms of the Legislature's power to delegate sentencing discretion, which ignores the question whether that discretion must be circumscribed, simply begs the issue.

Finally, State v. Johnson, supra, 168 A.2d 1, app. dism. 368 U.S. 145, cert. den. 368 U.S. 933, and State v. Walters, (Conn. 1958) 138 A.2d 786, app. dism. and cert. den. 358 US. 46, also do not support the refusal to reconsider the lack-of-standards contention. In *Johnson*, the court relied upon the existence of similar statutes in a majority of

American jurisdictions, the lack of any case holding such a statute unconstitutional, and, most importantly for our consideration here, the fact that the jury's discretion to determine the death penalty was not "absolute" under the New Jersey system, although the limitation on that discretion—that the jury must act to further "the interests of justice"—was surely more apparent than real. (168 A.2d at pp. 10-11.) And in *Walters* the court also relied upon a similar provision in a federal statute conferring discretion upon the jury, and argued that for special historical reasons, not present in California, the jury was exercising the clemency power.[14]

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[14] Similarly, the prior decisions of our court rejecting the lack-of-standards argument were all decided before *Witherspoon* and *Jackson*, and therefore their current precedential value is questionable.

The earliest case rejecting the lack-of-standards contention, People v. Mason, supra, 54 Cal.2d 164, 169, stated merely: "Defendant contends finally that it is a denial of due process of law to permit the jury to fix the penalty without prescribing standards to guide the exercise of its power. It is settled, however, that the selection of life imprisonment or death as the punishment for first degree murder is within the absolute discretion of the jury. (*People* v. *Green*, 47 Cal.2d 209, 232; *People* v. *Friend*, 47 Cal.2d 749, 764-768; *People* v. *Jones*, 52 Cal.2d 636, 652.)"

The three cases cited in *Mason* clearly hold that the trier of fact has absolute discretion to determine whether a defendant convicted of first degree murder shall suffer death or life imprisonment. But not one of the cases passes on the constitutionality of the administration of the death penalty in the absence of prescribed standards to guide the determination of the trier of fact.

Most recently, in People v. Hill, supra, 66 Cal.2d 536, 569, we disposed of the Fourteenth Amendment contention as follows: "Section 190.1 places the determination of life or death within the discretion of the trier of fact. [Citations.] The jurors were fully instructed by the court as to the matters which they might consider and the valuations they were required to make in approaching the threshold of their final judgment. We have heretofore declared that section 190.1 is not unconstitutionally vague." (*People* v.

The superficial discussions of these cases cannot justify our failure to reassess the lack of standards in the penalty trial in the light of well recognized constitutional principles.

Seiterle (1966), 65 Cal.2d 333, 340-341; see also *People* v. *Shipp* (1963), 59 Cal.2d 845, 853; *People* v. *Duncan* (1959), 51 Cal.2d 523, 529.)"

A review of the three cases cited by *Hill* for the proposition that we have hitherto declared constitutional the vesting of absolute discretion in the jury by sections 190 and 190.1 of the Penal Code reveals the terseness and inadequacy of the consideration which we have granted to the contentions now urged. *Seiterle*, the only case in which this court commented upon the Fourteenth Amendment "vagueness" ground now fully presented, fails to explain why the complete lack of standards in the present administration of the death penalty does not deprive capital defendants sentenced to death of due process of law. It rests on an incorrect interpretation of the first United States Supreme Court case (Giaccio v. Pennsylvania, supra, 382 U.S. 399) that recognizes that the "void-for-vagueness" doctrine applies to criminal statutes imposing penalties as well as to criminal statutes prescribing conduct sanctioned by penalties. (See discussion supra, p. 26 et seq.)

The discussion of the constitutional issue in *Seiterle* is limited to the following: "Defendant argues in effect that Penal Code section 190.1 is unconstitutional because it imposes upon the trier of facts the duty of selecting the penalty without specifying any guidelines or standards to be followed. The constitutionality of section 190.1, however, has previously been upheld. (*People* v. *Shipp*, 59 Cal.2d 845, 853; *People* v. *Duncan*, 51 Cal.2d 523, 529.) *Giaccio* v. *Pennsylvania*, 382 U.S. 399, cited by defendant, is not contrary to the cited cases." (65 Cal.2d at p. 340.) The court in one sentence then gives an overly narrow statement of the holding in *Giaccio* and concludes its discussion of the constitutional issue with a citation of footnote 8 in the *Giaccio* opinion which, as we explained above, requires a diametrically opposed reading of the case.

The two cases relied upon in *Hill* and *Seiterle*—namely, People v. Shipp, supra, 59 Cal.2d 845, and People v. Duncan, supra, 51 Cal.2d 528—do not support the conclusion that the absence of any prescribed standards to delimit the trier of fact's discretion in determining the penalty does not violate the capital defendant's Fourteenth Amendment rights. In *Shipp* the defendant contended that if the separate penalty trial provided for by section 190.1

Appendix B

The applicability of those principles to the administration of the death penalty has become clear beyond doubt by the very recent cases of the United States Supreme Court which have obliterated the old distinction between the legal process of determining the penalty in a capital case and that of

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cannot be waived, then the section is unconstitutional. The court merely responded: "The provisions of section 190.1 establishing the bifurcated trial are mandatory, and their constitutionality is settled. (*People* v. *Love*, 56 Cal.2d 720, 725; *People* v. *Corwin*, 52 Cal.2d 404, 407; *People* v. *Duncan*, 51 Cal.2d 523, 529; *People* v. *Feldkamp*, 51 Cal.2d 237, 240-241; *People* v. *Ward*, 50 Cal.2d 702, 706-711; *Ward* v. *State of California* (9th Cir. 1959), 269 F.2d 906.)" (59 Cal.2d 845, 853.) And in *Duncan*, relied upon in *Shipp*, the court merely stated: "There is no merit in defendant's contentions that section 190.1 of the Penal Code, adopted in 1957, which provides for separate trials of the issues of guilt, penalty, and sanity, is unconstitutional. (*People* v. *Feldkamp, ante*, p. 237; *People* v. *Ward*, 50 Cal.2d 702; *cf. People* v. *Cordova*, 14 Cal.2d 308, 309 et seq.)" (51 Cal.2d 523, 529.)

None of the cases relied upon in *Shipp* and *Duncan* raised the issue of the constitutionality of conferring absolute discretion on the trier of fact to determine whether a convicted capital defendant shall suffer death or life imprisonment. In People v. Love (1961), 56 Cal.2d 720, 725, the court stated only that: "Defendant contends that the trial court denied him due process by permitting the prosecutor to open and close the penalty trial and the argument to the jury. This procedure was expressly approved in *People* v. *Corwin*, 52 Cal.2d 404, 407." People v. Corwin (1959), 52 Cal.2d 404, did not involve any constitutional attack on the administration of the death penalty. *Corwin* held that the trial court did not err in permitting the prosecutor to both open and close the argument in the penalty trial. (52 Cal.2d at p. 407.) The only constitutional issue involved in People v. Feldkamp (1958) 51 Cal.2d 237, People v. Ward (1958), 50 Cal.2d 702, and Ward v. State of California (9th Cir. 1959), 269 F.2d 906, was whether the application of section 190.1 to a defendant convicted of a murder committed prior to the enactment of that section violated the constitutional prohibition against ex post facto laws. Finally, the only constitutional contention urged in People v. Cordova (1939), 14 Cal.2d 308, related to the procedure for the determination of guilt and sanity when the defendant enters dual pleas of not guilty and not guilty by reason of insanity.

determining guilt. We cannot, by retreat into history and tradition, justify ignoring "that basic requirements of procedural fairness" (Witherspoon v. Illinois, supra, 391 U.S. 510, 521, fn. 20) proscribe the imposition of the death penalty pursuant to a power of arbitrary decision.

IV. *Recognition of the unconstitutionality of sections 190 and 190.1 of the Penal Code does not affect the constitutionality of other forms of sentencing discretion in California.*

In its potential for abuse the absolute discretion conferred upon the trier of fact by sections 190 and 190.1 far outstrips any other form of sentencing discretion exercised under California law. As the United States Supreme Court recognized in *Witherspoon*, "much more is involved [in the trier of fact's determination whether the convicted capital defendant shall receive death or life imprisonment] than a simple determination of sentence." (391 U.S. 510, 521, fn. 20.) Two major, and constitutionally significant, reasons explain this disparity between the discretion exercised in the death penalty trial and that exercised in other sentencing situations. The first stems from the nature and gravity of the decision rendered by the trier of fact in the penalty trial as contrasted with that of other discretionary sentencing decisions. The second arises out of the lack of any recognized purpose for establishing this standardless discretion in adjudging the death penalty as contrasted with the inherent presence of standards in the penological regime of rehabilitation that circumscribe all other forms of sentencing discretion in California.

Skinner v. Oklahoma, supra, 316 U.S. 535, holds that the constitutionally requisite safeguards to prevent abuse of

discretion, and therefore the constitutionally requisite degree of specificity of standards to circumscribe the exercise of discretion, depend upon the right at stake and the irrevocability of the decision impairing that right. That the Constitution demands clear and definite legislatively prescribed standards to control the exercise of discretion to impair irrevocably the most fundamental right upon which all other rights depend, does not, therefore, necessarily imply that similar standards to control the exercise of other forms of discretion affecting less fundamental rights in a more revocable manner are constitutionally required. Hence, in determining the constitutional necessity for explicit legislatively prescribed standards to limit the exercise of delegated sentencing discretion, we must first focus upon the nature and gravity of the decision rendered by the delegatee of the sentencing discretion.

The trier of fact in the penalty trial renders the most drastic judgment a state can impose: whether to deprive a person of his life. Yet this decision lies in the absolute and unfettered discretion of the trier of fact. The trier of fact must select between two legislatively neutral alternative kinds of punishment. (See People v. Green, supra, 47 Cal.2d 209, 218.) Not even implicit principles, built into the statutory scheme, serve to guide or control this discretion. Such discretion, as we explain below, is *sui generis*. In all other cases of sentencing discretion, in which a less fundamental right is less irrevocably affected, the law furnishes standards to guide and control the exercise of the discretion.

Thus the anomaly of the death penalty trial as it is now conducted is that it proceeds in reverse of the principle of *Skinner*. In less vital sentencing decisions, such as the determination of whether a crime should be classified as a

felony or misdemeanor (see ditto opn., p. 18), the statutes and the decisions set forth a purpose and policy; guidelines may be derived from such purpose and policy. But when we come to the tremendous issue of whether the capital defendant should live or die we find no purpose, policy, or basic guidelines at all. We subject the greatest penalty to administration without any safeguards but we protect the *lesser* rights by such safeguards; we thereby invert the constitutional principle of *Skinner*.

Justice Burke's opinion erroneously attempts to compare the power of the trial court to punish certain crimes as either felonies or misdemeanors with the absolute discretion conferred upon the trier of fact by sections 190 and 190.1. The nature and gravity of the two procedures significantly differ, and the sentencing discretion exercised by the trial judge in making such a decision demonstrates no similar absolute discretion unguided by legislative purpose.

The only similarity between the trial judge's power under section 17 of the Penal Code to decide that a felony "be deemed a misdemeanor for all purposes after a judgment [imposing a punishment] other than imprisonment in the state prison," and the trier of fact's power under sections 190 and 190.1, is that both involve a selection between different kinds, rather than merely varying degrees, of punishment. Since the point at which a difference in kind shades into a difference of degree always remains debatable, however, this prima facie similarity can also be as accurately described as a difference.[15] But, regardless of

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[15] Imprisonment in the county jail clearly differs significantly from imprisonment in a state prison. Moreover, "when a crime is punishable by imprisonment in the state prison, or in the discretion of the court by imprisonment in the county jail, the actual punishment ordered is the test [for characterizing the crime as a

whether the trial judge has the power to select among kinds of punishment or only to determine degrees of deprivation of liberty, the nature and purpose of the discretion he exercises, as well as the gravity of the decision he renders, demonstrate the significant differences between section 17 and sections 190 and 190.1.

First, although sections 190 and 190.1 require the trier of fact to select between two legislatively neutral alternative penalties, section 17 does not confer discretion on the trial judge to select between two such neutral alternative penalties. The Legislature does express a preference in section 17 and provides in relevant part that " 'when a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment . . . in the state prison. . . .' This language has been construed uniformly to mean that the *felony aspect of the crime remains* until sentence is imposed for a misdemeanor and if no sentence is ever pronounced the offense remains a felony at all times." (Italics added.) (People v. Finley (1963) 219 Cal.App.2d 330, 340-341.)[16]

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felony or a misdemeanor]." (Meyer v. Superior Court (1966), 247 Cal.App.2d 133, 137.) Thus the consequences of undergoing the two different penalties also significantly differ. On the other hand, both obviously involve deprivations of liberty rather than of life and can therefore be described as two degrees of the same kind of punishment. And, of course, in terms of differences of severity, the two imprisonments are quite close compared to the difference faced by the convicted capital defendant.

[16] Several cases make clear that the "legal" sentence for a felony-misdemeanor is the felony sentence prescribed by the Legislature unless and until the trial court imposes a misdemeanor sentence. Thus, for example, the offense remains a felony for the purpose

Second, the trial judge in exercising the discretion conferred by section 17, like the Adult Authority in determining questions of extent of incarceration and parole (see People v. Morse, supra, 60 Cal.2d 631, 642-644; In re Lee (1918) 177 Cal. 690), acts within the penological system of rehabilitation. The Legislature has not failed here, as it has with sections 190 and 190.1, to indicate its purpose in conferring discretion. This purpose, which serves to guide the exercise of the trial judge's discretion, is implicit both in section 17 itself and in the general statutory scheme of sentencing discretion.

The purpose of the trial judge's sentencing discretion under section 17 is to impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon. Thus, the court in Meyer v. Superior Court, supra, 247 Cal.App.2d 133, 140, recognized that "in conferring upon the court the power [under section 17 as amended in 1963 (Stats. 1963, ch. 191, §1, pp. 2169-2170)] to declare an offense to be a misdemeanor after it has suspended imposition of judgment or sentence, the Legislature evidently intended to enable the court to reward a convicted defendant who demonstrates

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of the statute of limitations (Doble v. Superior Court (1925), 197 Cal. 556, 576-577); when imposition of sentence is suspended the court can set the term of probation at the maximum possible felony term, and can thereafter revoke probation and pronounce a misdemeanor sentence even after expiration of the maximum misdemeanor term (People v. Lippner (1933), 219 Cal. 395, 403); and in a homicide prosecution, evidence that the killing was in the perpetration of an alternatively punishable offense supports a determination that the homicide was second degree murder in the perpetration of a felony. (People v. Doyle (1958), 162 Cal.App.2d 158, 161.)

by his conduct that he is rehabilitated."[17] In discussing the trial court's duty under section 17 to determine "which [sentence] is the more appropriate to a given defendant," the court in People v. Smith (1968) 259 A.C.A. 923, 928, explained: "Modern penological thought is based upon the concept that punishment should fit the offender as well as the crime. Within the area delimited by constitutional and statutory restrictions, the sentencing judge has broad discretion to consider not only the offender's guilt, but also his potential for rehabilitation balanced against the community's need for protection."

Third, in addition to the legislative purpose of rehabilitation, the Penal Code (§§12, 13, and 1204) provides general procedures to guide the exercise of discretion conferred by section 17. (People v. Smith, supra, 259 A.C.A. 923, 927-928.) Although neither Constitution nor statute

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[17] The "integral and important part in the penological plan of California . . . of the probation procedures" (People v. Banks (1959), 53 Cal.2d 370, 383) further evidences the mitigating and rehabilitative purposes of the trial judge's discretion under section 17. In all cases in which a defendant convicted of a felony-misdemeanor is eligible for probation, the trial court must, *before* exercising its discretion under section 17, refer the case to a probation officer and then hear and determine the suitability of probation and in connection therewith consider the report and recommendations of the probation officer. (Pen. Code, § 1203.)

"Even in a case in which the defendant is not eligible for probation, the court may in its discretion refer the matter to the probation officer for an investigation of facts relevant to sentence (Pen. Code, § 1203). In a case in which the defendant is eligible for probation, if the court renders judgment without a reference to the probation officer, the judgment will be reversed, not for a new trial, but for the purpose of proceedings in accordance with statutory procedure. [Citations.] Reference to the probation officer in cases where the defendant is ineligible for probation is provided for in section 1203, Penal Code, and it is not an idle procedure. It furnishes a record of facts relevant to punishment, . . ." (People v. Gotto (1955), 138 Cal.App.2d 165, 168.)

establishes a right to a full-scale hearing on the question of penalty under section 1204, the cases have uniformly construed that section to afford to a defendant the right to present evidence in mitigation of his punishment. (See, e.g., People v. Valdivia (1960) 182 Cal.App.2d 145, 148 (discretion to grant or deny probation under Pen. Code, §1203); In re Klein (1961) 197 Cal.App.2d 58, 65 (discretion to sentence for a felony-misdemeanor under Penal Code section 17); In re Miller, supra, 176 Cal.App.2d 75, 78-79 (discretion under Penal Code section 17).). "[S]ection 1204 of the Penal Code 'requires the court in determining the consequences of guilt to receive *evidence* [with the exception of the probation report provided for by section 1203] either in mitigation or aggravation of the punishment to be imposed. . . . The statute demands that the duty of determining the question of aggravation or mitigation of punishment be performed with scrupulous fairness to the defendant.'" (In re Miller, supra, 176 Cal.App.2d 75, 78-79, quoting People v. Neal (1950) 97 Cal.App.2d 668, 676, a case involving the trial judge's discretion to sentence a defendant convicted of more than one felony either concurrently or consecutively under Penal Code section 669; see also People v. Surplice (1962) 203 Cal.App.2d 784, 792.)

Fourth, and most important, the discretion of the trial judge under section 17, unlike that of the trier of fact under sections 190 and 190.1, is not final and "absolute." The convicted and sentenced defendant may seek appellate review on the ground of "abuse of discretion." (People v. Smith, supra, 259 A.C.A. 923, 928; People v. Surplice, supra, 203 Cal.App.2d 784, 791-792; In re Miller (1959) 176 Cal.App.2d 75, 78-79.)

For the above reasons we submit that the type of sentencing discretion vested in the trial court by section 17

constitutes "discretion in the legal sense of that term" as opposed to the "naked and arbitrary power" (Yick Wo v. Hopkins, supra, 118 U.S. 356, 366) conferred upon the trier of fact by sections 190 and 190.1. "Legal" or "judicial" discretion "implies absence of arbitrary determination, capricious disposition or whimsical thinking. . . . To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (People v. Surplice, supra, 203 Cal.App.2d 784, 791.)

We summarize the reasons why Penal Code sections 190 and 190.1 violate due process of law. The absence of standards in the penalty trial confers absolute discretion upon the judge or jury to decree death; the capital defendant suffers death by the exercise of arbitrary power. The defendant does not know how to prepare a defense for such a trial because it lacks definable issues; this appellate court cannot intelligently review it. If the imposition of the penalty is an absolute exercise of discretion, we lack any standard of review; the judgment of death lies within the mystique of the untouchable. Indeed, in the face of the fact that "the jury must decide the question [of life or death] without benefit of guideposts, standards or applicable criteria" (People v. Terry (1964) 61 Cal.2d 137, 154), this court has described the speculative and illusory nature of the penalty trial and of its reviewability. We said, "To attempt to assess the effect of error in this legal vacuum is to superimpose one untestable surmise upon another. We must not pile conjecture upon conjecture and posit the decision of life or death upon a pyramid of guesses." (*Id.* at p. 154.)

In its potential for abuse the power conferred upon the trier of fact by sections 190 and 190.1 thus surpasses all

other forms of sentencing discretion. The defendant sentenced to death cannot obtain judicial relief on the ground of abuse of discretion because the lack of standards in the administration of the death penalty has rendered proof of such "abuse" in this context impossible.

As the United States Supreme Court recognized in the landmark case of Yick Wo v. Hopkins, supra, 118 U.S. 356, 369-370, "It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, ... For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

If constitutional principle requires that standards be followed by the trier of fact in reaching its decision in all other legal proceedings, even to the matter of payment of the costs of a trial, and if the United States Supreme Court has only recently ruled that the procedure for the death penalty must be founded upon "basic requirements of procedural fairness," the requirement for standards applies to Penal Code sections 190 and 190.1. To permit a judge or jury to decree a death sentence when no stan-

dard, policy, or purpose explains why one capital defendant should be spared and another executed, and thus to sanction an arbitrary taking of life, is an enormous deprivation of due process and equal protection of the laws.

Although Justice Burke's opinion assures us that the emotional amalgam of the jurors' reactions as to the penalty should be upheld as an expression of the "conscience of the community," the rhetoric hardly obscures the reality. That there is no "conscience of the community" which can distinguish between those capital defendants who should suffer the death penalty and those who should be spared finds graphic illustration in the in-depth statistical study of Hans Zeisel, "Some Data on Juror Attitudes Towards Capital Punishment" (1968) Center for Studies in Criminal Justice, University of Chicago Law School. After demonstrating that he can find no decisive factors which account for the infliction of the penalty, Zeisel concludes: "In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes. *The discretionary use of the death penalty requires a decision which no human should be called upon to make.*" (Fn. omitted.) (Italics added.)[18]

Sections 190 and 190.1 permit the judge or jury to decree the random doom of death without the restraining guide of reason. Neither society nor the Legislature nor the

[18] Zeisel's empirical study accords with the point made by Professor Wechsler: "A discretionary system . . . becomes inevitable with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is . . . a most important element of justice." (Symposium on Capital Punishment (1961), N.Y.L.F., v. 7, pp. 250, 259.)

courts have said why one capital defendant should be selected to die and another to live. The death penalty has been supported as a punishment, a deterrent, a safety valve for revenge, an economy for the state, and on other grounds, each of which has been as hotly defended as it has been severely attacked. But no one knows which of these notions, and as many others as the mind can conjure, are accidentally seized upon by judge or jury to grant or deny life. No one knows what moves judge or jury to select a capital defendant for death. We know only that the motives and notions that deal out death are as obscure, disordered, and irrational as the statistical incidence of the death penalty itself. (Sellin, Capital Punishment (1967) 202; Kalven & Zeisel, The American Jury (1966) 436-444.) Yet the foundation rock of the law is reason; the judicial process presupposes "that its determinations are justified only when explained or explainable in reason." (Breitel, *The Law Makers* (1965) 65 Colum.L.Rev. 749, 772.)

The irrational process of decreasing death cannot be reconciled with a sense of reasoned justice; we cannot explain why or when we impose the penalty. If a civilized society cannot say why one man should be executed and another not, it does not rationally, logically, take life. Instead, it grossly denies due process of law in inflicting death upon the basis of a trial that is capricious, discriminatory, and guess-infested.

I therefore dissent from the court's ruling on the constitutionality of the death penalty, but concur in the opinion on the other issues.

TOBRINER, *J.*

WE CONCUR:

TRAYNOR, *C.J.*
PETERS, *J.*

Appendix B

[*Concurring and dissenting opinion by McComb, J.*]

For all the reasons set forth in Mr. Justice Burke's opinion, I concur in the decision of the majority of this court that the death penalty is constitutional and does not constitute cruel or unusual punishment, that Penal Code sections 190 and 190.1 are valid, and that petitioners will be afforded the services of counsel in all proceedings between the termination of their state appeals and their execution. I respectfully dissent from that portion thereof that sets aside the death penalties under the compulsion of Witherspoon v. Illinois, 391 U.S. 510 [88 S.Ct. 1770].

The circumstances that influenced the United States Supreme Court to conclude that the *Witherspoon* jury "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments" (88 S.Ct. at 1775) did not exist in the two cases before us.

The jury that fixed the penalty at death in *Saterfield* was composed of 12 men and women, each of whom, on *voir dire* examination by defendant through his counsel, solemnly swore that he had no preference for one penalty over another or had no preconceived notion that one was more appropriate than the other. The record shows:

Juror Shaver. "Q. And as I have indicated you may be called on to decide the question of penalty. Do you have any feelings that one penalty is more appropriate than the other? A. No, sir, I don't think so."

Juror Kavanaugh. "Q. And if the question of penalty is put up to you, do you have any, start—at this point, we will put it that way, with any feelings one penalty is to be preferred over the other? A. No. Q. Do you feel that the facts of the case should determine, perhaps, what penalty is imposed? A. That is right. Q. If that question [penalty] reaches you? A. Yes."

Juror Allis. "Q. Any feeling, if that question of penalty is submitted to you, any feeling that one is to be preferred over the other? A. (Juror indicates negatively.) Q. One is more appropriate than the other? A. No."

Juror Wehrs. "Q. Do you have any feeling that there are—at least aware of any feeling that anyone who takes a human life should give his life in exchange? A. Do I have any what? Q. In other words, do you feel that anyone who kills another person should be executed? A. Based on the evidence and the instructions I received, I would make my determination from that. Q. But you have no feeling at this point? A. No preconceived feeling, no."

Juror Reynolds. "Q. If the circumstances, or the question of penalty is submitted to you, do you, at this time, have any feelings as to whether the death penalty or life imprisonment is more appropriate? A. No. Q. It is a question of the facts presented to you? A. Yes."

Juror Leasure. This juror was not specifically asked if she had any feeling that one penalty was more appropriate than another, but defense counsel asked: "Q. Mrs. Leasure, I presume you were able to hear my questions? A. Yes. Q. Any of them you feel calls for comment, as far as you were concerned? A. No."

Juror Pulliam. "Q. Do you have any feelings, at the moment, one penalty or the other is more appropriate? A. No."

Juror Hilburn. "Q. And as has also been indicated to you, it may evolve upon you to decide penalty in this case; do you have any feeling one penalty is more appropriate than the other at this time? A. No, sir."

Juror Georges. "Q. Do you have any particular feelings that, assuming the question of penalty is ever submitted to you, that one penalty is more appropriate than the other? A. No, sir."

Juror Hall. "Q. Do you have any particular feelings, if the question of penalty is ultimately submitted to you, as to what penalty is most appropriate? A. No, I don't at this time. I'd have to hear the evidence."

Alternate Juror Moss. "Q. Do you have any feelings that if the question of penalty is submitted to you, do you have any feelings, at the moment, one penalty would be more appropriate than the other? A. No."

Alternate Juror Moore. "Q. Do you have any particular feeling one penalty is more appropriate than another? A. No. Depends on the case, of course."

I do not understand how the above jurors can, by any definition, be said to be jurors "uncommonly willing to condemn a man to die." (88 S.Ct. at 1776.)

While the questions propounded by the defense to the *Anderson* jurors were not so precisely worded as in *Saterfield*, it is clear to me that, unlike *Witherspoon* (where "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die" (ibid.)) the State of California was in search of a jury that was capable of imposing either one of the alternative penalties provided by state law based on which penalty the individual juror believed was justified. A typical question asked of prospective jurors by the prosecution time after time was, in substance: "If you felt that the merits of this case were consistent with what you would require in a proper case, you would have no hesitancy in returning the death penalty? [Answer.] And by the same token, if you felt the case on its merits didn't measure up to that which you felt was a proper case for the death penalty, you would have no hesitancy in returning a verdict of life imprisonment, is that correct? [Answer.]" Sometimes the questions were stated in reverse

order: "If you felt that the case warranted the returning of life imprisonment, you would return such a verdict, is that correct? [Answer.] And on the other hand, if you, felt the case justified the death penalty, I take it you'd return such a verdict? [Answer.]"

Again unlike *Witherspoon*, the State of California did not "entrust the determination of whether a man shall live or die to a tribunal organized to return a verdict of death." (88 S.Ct. at 1776.)

Witherspoon tells us that an acceptable impartial juror is one who will "be willing to consider all of the penalties provided by state law and no be irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." (88 S.Ct. at 1777, fn. 21.) Yet, a jury, as a body, (who must return a unanimous verdict) does not represent a cross-section of the community and is, ipso facto, not an impartial jury, unless it is composed of some individual jurors who "harbor doubts about the wisdom of capital punishment" or who "would be reluctant to pronounce the extreme penalty." (88 S.Ct. at 1776.) These differing qualifications for an impartial individual juror and an impartial jury as a body are beyond comprehension, as 12 impartial jurors should add up to one impartial jury. Regardless of the arithmetic involved, for reasons not in issue in *Witherspoon*, that case does not, in my opinion compel setting aside the death penalty in our cases.

The majority say that they cannot conjecture that the prosecuter would have used his peremptory challenges to exclude jurors who were excused for cause by the court on its own motion. It is entirely reasonable that the People would have done so. In *Saterfield*, the People exercised only

2 of its 20 peremptory challenges in the selection of the 12 regular jurors and only one peremptory challenge in the selection of 4 alternates. In *Anderson*, the People used only 9 of its 20 peremptory challenges. Since none of the alternates served in *Anderson*, the manner of their selection is of no consequence. The defense was satisfied with the jury after the exercise of 10 peremptory challenges in *Saterfield* and 8 in *Anderson*.

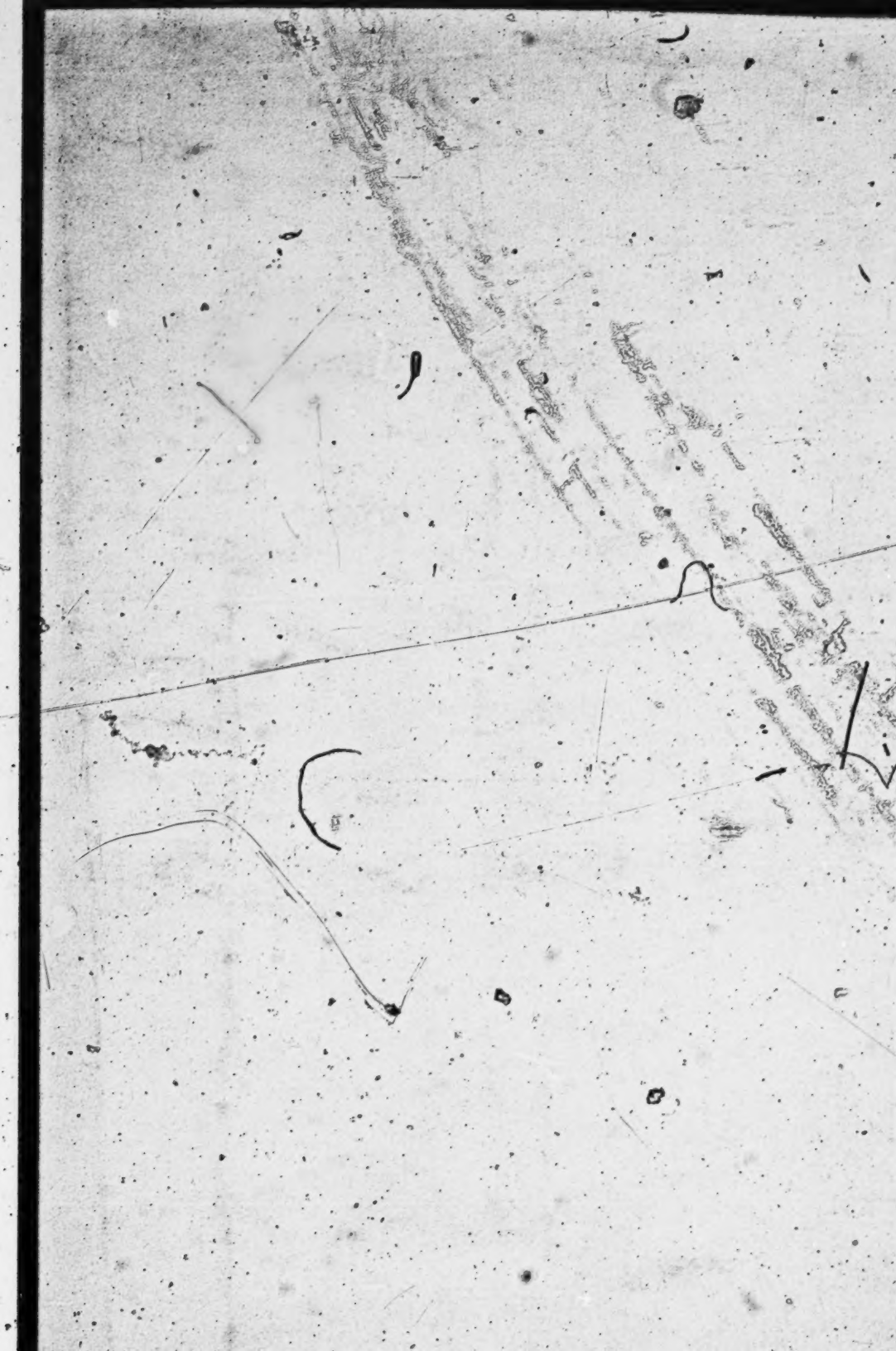
Witherspoon speaks only of veniremen improperly excused for cause and repeatedly criticizes the State of Illinois for having excused *all* veniremen who harbored doubts about the wisdom of capital punishment or *all* who said they did not believe in, or were opposed to, capital punishment. There is nothing in the opinion that compels the conclusion that the death penalty would have been set aside had some lesser number been improperly excused. As the majority of this court point out, the *Witherspoon* court did not discuss the effect of the existence of remaining peremptory challenges of the prosecution. That issue was not before them.

Mr. Chief Justice Weintraub, speaking for the New Jersey Supreme Court in State v. Mathis, 245 A.2d 20, has taken the correct approach to the problem of jury selection and/or exclusion in conformity with the *Witherspoon* rule: "The thesis of *Witherspoon* is that persons who dislike capital punishment but are nonetheless capable of weighing the penalty issue constitute a segment of the community within the concept that a jury shall be drawn from a cross-section of the community. The erroneous exclusion of some jurors does not mean that the balance of the jury list was thereby deprived of representatives of that segment. Nor would it matter if no member of that segment in fact was selected. A defendant's right is to a fair opportunity to draw from

all relevant segments, and unless the erroneous rulings amounted to a denial of that opportunity, the constitutional right was not infringed. To hold otherwise would burden the judicial process with no demonstrable justification. And we think it correct to add that if the prosecution did not use all its peremptory challenges, that fact may be a relevant makeweight, for it is not unreasonable to assume that the remaining challenges would have been used, had the trial court ruled against the State on its objection to a specific juror. Here the State used only 7 of its 12 peremptory challenges." (P. 27.)

I would deny the writs.

McCOMB, *J.*



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

Petitioner prays for review of error in the opinion and judgment of the Supreme Court of Alabama entered in the above entitled case on February 8, 1968 (A 36-42), pursuant to which petitioner is sentenced to death by electrocution.

Citations to Opinions Below

The opinion of the Supreme Court of Alabama rendered on February 8, 1968 is unreported as of this date, but is found in the Appendix hereto, pp. 36-41. A dissenting opinion, with three (3) judges concurring, was included with the opinion.

On February 22, 1968, petitioner filed an Application for re-Hearing and notification of the filing of the Application for re-Hearing and Certificate of Recall was duly filed by petitioner, but the Supreme Court of Alabama by order dated March 7, 1968 overruled the Application (A 43).

On March 18th, the Supreme Court rendered an order on petitioner's Application for a stay of execution pending an appeal to the Supreme Court of the United States, and by the same order, re-set the date for the execution of the judgment and sentence for Friday, June 28, 1968 (A 44), and by further order of the Supreme Court of Alabama, a stay of execution pending consideration of a Petition for Writ of Certiorari by the Supreme Court of the United States was granted on June 17, 1968. (A 45)

Jurisdiction

A motion for leave to proceed *in forma pauperis* and a Petition for Writ of Certiorari was filed on June 4, 1968 in the Supreme Court of the United States and certiorari was granted on October 14, 1968. (A 46)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Statute Involved

The statutory provision involved is Title 14, Section 415, *Code of Alabama,* Recompiled 1958, which is set out herewith:

"Section 415 Punishment of Robbery.—Any person who is convicted of robbery shall be punished, at the discretion

of the jury, by death, or by punishment in the penitentiary for not less than ten (10) years."

Questions Presented

1. THE IMPOSITION OF THE DEATH PENALTY FOR ROBBERY CONSTITUTES A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

2. THE SUPREME COURT OF ALABAMA FAILED TO PROTECT PETITIONER'S RIGHT TO DUE PROCESS WITH REGARD TO HIS PLEA OF GUILTY.

3. THE SENTENCE OF DEATH IMPOSED ON THE PETITIONER BY THE ALABAMA JURY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Statement of the Case

Edward Boykin, Jr., a twenty-seven (27) year old Negro, son of a tenant farmer from Wilcox County, Alabama, was convicted on his pleas of guilty to five (5) separate indictments of robbery.* One jury heard all five (5) cases simultaneously and sentenced him to death by electrocution for each offense.

The essential facts are as follows:

Edward Boykin, Jr. was indicted by a grand jury on June 29, 1966 on five (5) counts of robbery and bail was set at $2,500.00 (A 2). Petitioner was appointed counsel on Mon-

* The common law prevails in Alabama as to the offense of robbery, and Title 14, Section 415, *Code of Alabama*, Recompiled 1958, merely prescribes the punishment therefor.

day, July 11, 1966, after a determination of indigency, and was arraigned on the five (5) indictments of robbery three days later, July 14, 1966, at which time he pled guilty (A 2, 3, 4).

On September 20, 1966, the accused was brought to trial on each of the five (5) robbery indictments before a jury and on his plea of guilty, the prosecutor presented a prima facie case on each offense through testimony of witnesses:

1. James V. Loper, manager of a grocery-chain store, testified that on May 8, 1966, at about 11:00 P.M., the accused and another Negro came in the store, pulled a gun and made the witness and another employee lie down on the floor while money was removed from the cash register (A 11). The witness further testified that:

> "A. Well, after he (the accused) got the money, he turned and goes out the door and shoots back to see that we don't get up and follow him, I guess." (A 12)

The witness went on to testify that the bullet entered the door and went up into the ceiling. (A 13)

The Defense did not question the witness.

2. Annette Fawcett, a drug store owner, testified on May 6th at about 9:00 P.M., two customers came into her store (one of whom she identified as the accused), produced a gun and took money from her cash register (A 18). When the accused had difficulty with the car keys, the gun went off and went into the floor; it ricocheted and hit the calf of a girl's leg, who was in the store. The witness testified on direct examination:

"A. I think maybe he intended to shoot just to frighten because the officer said it hit the floor and, you know." (A 20)

The cross examination focused on the discharge of the weapon wherein the witness again testified:

"A. I don't believe that he really intended to kill her, but . . . ." (A 21)

3. Jerry Smith, an employee of a retail ice cream business, stated that on April 23, 1966, at about 11:40 P.M., he was met by the accused at the rear door of the establishment. The accused produced a gun and after entering the place, took money from the cash register. (A 23)

The Defense did not question the witness.

4. John E. G. Campbell, operator of a combination service station, grocery and general merchandising store, stated that on May 5, 1966, at about 8:00 P.M., the accused and an accomplice entered his store. They held him up and took some money from the cash register. Frustrated in an attempt to take the witness's car, the accused and his accomplice ran down the street away from Mr. Campbell's place of business. (A 27)

The Defense did not question the witness.

5. Sylvester Pugh, a service station operator, testified on May 3, 1966, he was about to close for the night when two individuals (one being the accused) produced a .45 caliber pistol and took money from the cash register where he was counting it. After having the witness walk away

from the station (one-half block), the accused departed. (A 30)

The Defense did not question the witness.

6. Walter Hersh, the owner of the ice cream parlor, testified that he was not present during the robbery, but because it was his property that was taken, he was called to his place of business. (A 25)

The Defense did not question the witness.

At the conclusion of the Prosecution's evidence, the Defense offered no evidence for the accused as to any of the offenses, nor was any evidence offered by defense counsel in mitigation or extenuation of the offenses. (A 31)

The trial court then proceeded to instruct the jury with regard to the law of robbery, and it appears from the trial court's opening remarks that some of the jurors had just that week sat on other robbery cases. (A 32) After the conclusion of the oral charge by the Court, a juror asked the Court:

> Juror: "We have five cases. These sentences will not run concurrently, will they?"
>
> Court: "They will not run concurrent unless the jury requests it."

Whereupon the jury, which under the law of the State of Alabama for the offense of robbery finds the verdict and sets the sentence in one single deliberative session, retired. Later, delivering five (5) verdict-sentence pronouncements of guilty and death by electrocution. (A 32-33)

On September 21, 1966, having neglected to set the date for execution, the Court reimposed the sentence to death by electrocution and set the date of execution as December 16, 1966.

An appeal was automatically ordered by the Court as is required in capital sentences, but no attorney was appointed, by the Court order, to prosecute the appeal although indigency had previously been determined.

Soon thereafter, on October 5, 1966, Donald Jelinek, Esquire, a member of the staff of Lawyer's Constitutional Defense Committee of the American Civil Liberties Union in Selma, Alabama, voluntarily undertook the appeal on behalf of the Petitioner, but was notified on October 10, 1966, by the Deputy Clerk of the Supreme Court of Alabama, that he was not authorized to practice before that Court.

On October 25, 1966, present counsel, a co-operating attorney of the American Civil Liberties Union, through its affiliate in the State of Alabama, was contacted by Mr. Jelinek and agreed to undertake the appeal. It was too late at this date, however, to raise any issue on Motion for a New Trial, as the statutory time-period had elapsed.

Briefs were submitted in support of the appeal, but the Supreme Court of Alabama affirmed by opinion dated February 8, 1968. During that time and until now, Edward Boykin, Jr. has been on death row in Kilby Prison, Montgomery, Alabama awaiting execution for robbery.

ARGUMENT

I.

The Imposition of the Death Penalty for Robbery Constitutes a Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments.

Edward Boykin, Jr., awaiting execution in a death row cell at Kilby Prison in Montgomery, Alabama, is a unique person—few are similarly situated and few could be.

Edward Boykin, Jr. was not sentenced to death because he committed five (5) robberies—many others do as much and more without being sentenced to die for it. Nor was he sentenced to death because he (i) committed five (5) robberies (ii) in Alabama—although there are very few other places where it would be possible, let alone probable, that he would be so sentenced for such a crime. He probably was not sentenced to death because he (i) committed five (5) robberies (ii) in Alabama and (iii) is poor and black—although all these elements were important. The additional indispensable elements are probably known, consciously or subconsciously, only by the jury which condemned him to die.

The point is that Edward Boykin, Jr. is unique because today the imposition of the death penalty is unique.

As this brief will show, there is a growing realization that the death penalty is unwarranted in principle and requires so rare a combination of people, places and prejudice as to border on a grotesque fluke.

And because the death penalty is today both unwarranted and a fluke, it is "cruel and unusual" and unconstitutional* as applied to Edward Boykin, Jr.

A. The Meaning of "Cruel and Unusual Punishment" Is to Be Drawn From Our Contemporary Standards and Mores.

The concept of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910). Likewise, the Due Process Clause "is not confined within a permanent catalogue of what may at a given time be deemed the limit or the essentials of fundamental rights . . ." *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949).

Notwithstanding the inherent ambiguity of the language, this Court has indicated that semantic exercises are unnecessary and that "the meaning (of unusual) should be the ordinary one, signifying something different from that which is generally done." *Trop* v. *Dulles*, 356 U.S. 86, 110 n. 32 (1958). Similarly, the concept of "cruel" is not confined to the disgusting and savage penal practices of an earlier era.

The dynamic quality of the Eighth Amendment's proscription, so clearly articulated in *Weems*, was reasserted by this Court in *Trop supra*. In holding that deprivation of citizenship for wartime desertion constituted "cruel and

* The Fourteenth Amendment incorporates the protections of the Eighth Amendment and applies to the States as well as the Federal Government. E.g., *Robinson* v. *California*, 370 U.S. 660 (1962).

unusual" punishment, Mr. Chief Justice Warren emphasized that:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards . . . The Court (has) recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-101.

See also, *Robinson* v. *California*, 370 U.S. 660 (1962) especially, Douglas, J. concurring, *id.* at 676 ("The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man").

Thus, the Supreme Court of Alabama clearly was wrong in ignoring the evolving nature of the meaning of "cruel and unusual" and stating, "(a)ny punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual in the constitutional sense." (A 38)

B. The Petitioner Stands Virtually Alone in Facing the Death Penalty for a Property Crime Like Robbery.

The evidence is irrefutable that throughout the civilized world there has been a startling decline* in the use of capital punishment.

> "Today more than seventy nations and thirteen of our states have generally abolished the death penalty. While most states and the federal system reserve the ultimate sanction, it has been rarely used in recent years. There were 199 executions in the United States in 1935. There was only one in 1966; two in 1967. Only one person has been executed under any of the 29 federal statutes authorizing death in the past decade." Attorney General Clark, Hearings on S. 1760, Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

The statistics tell only a part of the story. Accompanying, and contributing to, the precipitous decline in the use

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* The following table indicates the total executions for all crimes in the United States and Alabama for the period 1930–1967:

Year	Total Executions in U.S.	Total Executions in Alabama
1930–34	776	19
1935–39	891	41
1940–44	645	29
1945–49	639	21
1950–54	413	14
1955–59	304	6
1960	56	1
1961	42	1
1962	47	1
1963	21	0
1964	15	1
1965	7	1
1966	1	0
1967	2	0

Source: 42 *National Prisoner Statistics Bulletin*, Table 15 (June, 1968)

of the death penalty has been a mounting storm of public criticism of this barbaric custom. This Court has noted that public opinion polls show that more Americans now oppose rather than favor capital punishment for convicted murderers. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520, at n. 16 (1968). This reflects the continuing trend toward abolition. See Bedau, "The Courts, The Constitution and Capital Punishment", 1968, *Utah Law Review* 201, 206 (May, 1968).

Direct evidence to support the view that there is a widespread antipathy to the death penalty can be found in the statements of prospective jurors in capital cases as in *Witherspoon* v. *Illinois, supra* at 514, where "47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty."

Fear of error and reluctance to actually apply the prescribed penalty have led to an intolerable situation where, at the end of 1967, over four hundred prisoners were incarcerated under sentence of death; these unfortunate individuals have been awaiting death a median elapsed time of 29 months since being sentenced. 42 *National Prisoner Statistics Bulletin*, Table 10 (June, 1968). This situation creates its own form of cruelty.

The uniqueness of Edward Boykin, Jr.'s plight is underscored by the fact that he is to die for a property crime--only eleven of the fifty states presently retain death as a possible punishment for robbery and/or burglary, the only property crimes which realistically can be said to be punishable by death.*

* Robbery and burglary are the only property crimes for which anyone has been executed since 1930 when such statistics began

Georgia, under the new criminal code effective July 1, 1969, abandoned the death penalty for robbery. The Criminal Law Study Committee noted:

> "Under the present law robbery by force and robbery by the use of an offense weapon may result in the death penalty. The death penalty is not warranted for theft alone, regardless of aggravated circumstances, unless death results, in which case the death penalty is possible under homicide provisions. A proposed penalty of one to 20 years' imprisonment should be broad enough to cover all incidents of robbery, no matter how committed." Committee Notes, chapter 26-19, Georgia Code Annotated (1968).

As discussed below, common law robbery requires only larceny by putting in fear, (rather than actual violence) and Alabama juries under the present statute could conceivably punish by death one who demands another's property on threat of a slap in the face. Alabama stands alone as the only State in the union which retains the death penalty for common law robbery.

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regularly to be compiled. 42 *National Prisoner Statistics Bulletin*, Table 3 (June, 1968).

The following states retain death as a punishment for robbery and/or burglary: Ariz. Rev. Stat. §13-644 (train robbery); Code of Ala., Tit. 14, §415 (robbery); §416 (train robbery) and §85 (first degree burglary); Ga. Code Annot. §26-2502 (robbery by open force or violence); Ky. Rev. Stat. §433.140 (armed robbery and armed burglary); Miss. Code Annot. §2364 (armed robbery); Vernon's Annot. Mo. Stat. §560.135 (robbery by means of a deadly weapon); N.C. Gen. Stat. §14-52 (first degree burglary); 21 Okla. Stat. Annot. §801 (armed robbery); Tenn. Code Annot. §39-3901 (robbery with a deadly weapon); Vernon's Annot. Tex. Pen. Code §1408 (robbery by violence or with a deadly weapon); and Code of Va. Tit. 18.1-86 (burglary).

For a listing of other property crimes nominally punishable by death, see Bedau, *The Death Penalty in America*, 43-45 (rev. ed. 1967).

Even in those few states which do retain the death penalty for robbery, it has been rarely imposed; the last execution for robbery in the United States was in 1962. The following table clearly reflects the current general disuse of the death penalty for property crimes:

TOTAL U. S. EXECUTIONS FOR PROPERTY CRIMES

Year	Robbery	Burglary	Total
1950	1	0	1
1951	1	0	1
1952	0	0	0
1953	0	0	0
1954	1	0	1
1955	2	0	2
1956	0	0	0
1957	0	1	1
1958	1	0	1
1959	0	0	0
1960	1	0	1
1961	0	0	0
1962	1	0	1
1963	0	0	0
1964	0	0	0
1965	0	0	0
1966	0	0	0
1967	0	0	0

Source: *National Prisoner Statistics Bulletin* for the years 1950–67.

The conclusion is inevitable. The progress of our civilization, marked by an increasing awareness of the sanctity of human life and the dignity of man, no longer tolerates the penalty of death for the crime of robbery.

C. The Death Penalty for Property Crimes Is Now Reserved Exclusively for Negroes.

It is well recognized that the death penalty has been applied in a discriminatory fashion in this country.

> "Clarence Darrow observed that, 'from the beginning, a procession of the poor, the weak, the unfit, have gone through our jails and prisons to their deaths. They have been the victims.' It is the poor, the weak, the ignorant, the hated who are executed. Racial discrimination occurs in the administration of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes, and 1,751 white persons put to death, although Negroes made up only one-eighth of our population. Of the 455 men executed for rape, 405 were Negroes." Att. Gen. Clark, Hearings on s. 1760, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

Alabama is no exception to the disturbing pattern. Since 1930 the state has executed 135 persons; of these 107, or 80%, have been black. 42 *National Prisoner Statistics Bulletin*, Table 3 (June, 1968).

Responsible observers have rejected the possibility that a higher crime rate among the poor generally and Negroes specifically accounts for the grossly disproportionate number of Negroes executed and negates discrimination:

> "Even conceding this to be so (that the disproportionate number of crimes committed by the poor and members of minority groups accounts for the disproportionate imposition of the death penalty in those groups), there is inequality. For instance, rape is a

capital offense in the Southern States. During 1930-1960, there were 434 executed for this crime. Of those only 42 were white. In the states of Florida, Louisiana, Mississippi and Virginia, all the 90 persons executed for rape were Negroes.

"Four states provide the death penalty for burglary, but only North Carolina and Alabama have executed anybody for that crime in the last thirty-one years. The 11 persons executed were all Negroes. It is not reasonable to assume that only Negroes committed the rapes and burglaries in those states. What is reasonable is that white persons who committed such crimes benefited from more favorable decisions by juries and pardon authorities—receiving life sentences, lesser punishment and commutations." Penn. Joint Legis. Comm. on Capital Punishment, *Report,* 14-15 (1961).

History shows clearly that white America will not now execute whites for property crimes and that the death penalty for such crimes is reserved exclusively for Negroes like Edward Boykin, Jr. No white man has been executed for a property crime in this country during the last 18 years. See National Prisoner Statistics Bulletins for the years 1950-67. During that period, however, nine Negroes were executed for such crimes (8 for robbery and 1 for burglary). *Ibid.*

During the period 1930 through 1967, 19 of the 25 men executed for property crimes were Negroes. 42 *National Prisoner Statistics Bulletin,* Table 3 (June, 1968). Using the longer period as a basis, it is plain that the practice of executing whites for property crimes is not widespread

—only three jurisdictions accounted for all 6 of such white men (Federal 2, Kentucky 3 and Oklahoma 1). *Ibid.*

Turning to Alabama, the State executed 7 men for property crimes (robbery 5 and burglary 2) from 1930 through 1967—and all were Negroes. *Ibid.* The State of Alabama contends that this latter statistic is in error and asserts that one white man was executed for robbery on September 4, 1964. *Cobern* v. *State,* 273 Ala. 547, 142 So. 2d 869. If error, the ratio of 7 to 1 is as disproportionate with regard to population as was the crime of James W. Cobern to the crimes committed by Edward Boykin, Jr. James W. Cobern, according to the case report, murdered his victim by beating in her skull, shooting a .22 caliber rifle bullet in the chest, puncturing her vaginal area with a poker and then after she was dead, robbed her of her car. The crimes are unequal and the justice is unequal.

The imposition of the death sentence on Edward Boykin, Jr. is part of this pattern of unequal justice and thereby constitutes "cruel and unusual" punishment under any reasonable construction of those words.

D. It Violates the "Eighth Amendment" to Take a Human Life for a Crime Where No Life Was Taken and No Serious Injury Inflicted.

Courts considering the Eighth Amendment have sometimes asked whether the punishment "because of its severity (is) shocking to the sense of justice to the people of the United States . . . " *United States* v. *Ragen,* 54 F. Supp. 973, 981 (N.D. Ill. 1944) aff'd 146 F.2d 349 (1945). See, also, *Francis* v. *Resweber,* 329 U.S. 459, 473 (1947) ("shocks the most fundamental instincts of civilized man") (Burton, J., dissenting).

The facts in the instant case present such a shocking situation because Edward Boykin, Jr. is to lose his life when he neither took another life nor caused serious injury. Even under a retributive theory of punishment, "an eye for an eye; a tooth for a tooth," one cannot possibly make petitioner's punishment fit his crime.

Petitioner took less than twelve hundred dollars from five retail establishments. He did not kill or seriously injure anyone. On the two occasions when his gun apparently discharged, there was testimony that he did not intend to kill or seriously harm. (A 12, 15, 21)

As noted above, Georgia recently repealed the death penalty for robbery on the very ground advanced here. The Criminal Law Study Committee determined that "(t)he death penalty is not warranted for theft alone, regardless of aggravated circumstances unless death results, in which case the death penalty is possible under homicide provisions." Committee Notes, chapter 26-19, Ga. Code Ann. (1968).

In light of the foregoing, execution of the petitioner for robbery is an affront to the fundamental concepts of justice underlying the Eighth Amendment.

E. Execution of the Petitioner for the Crime of Robbery Is So Disproportionate to the Offense as to Amount to Cruel and Unusual Punishment Under the Eighth Amendment.

When the penalty for a particular crime is so excessive as to be regarded as disproportionate to the offense

charged, it falls under the Eighth Amendment prohibition against cruel and unusual punishment.*

This interpretation of the Eighth Amendment was applied by this Court over fifty years ago in *Weems* v. *United States*, 217 U.S. 349 (1910). In determining whether the prescribed punishment for the crime of forging official documents was so excessive as to be "cruel and unusual" the majority of the court said:

> "... we turn back to the law in controversy. Its character and the sentence in this case may be illustrated by examples even better than it can be represented by words. *There are degrees of homicide that are not punished so severely,* nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States ...." *Id.* at 380 (emphasis added).

The Court went on to contrast the penalties prescribed for the offense of forgery or counterfeiting of government securities similar to that for which Weems was convicted and concluded that:

> "... the highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent which the duty of the State should be as eager to prevent the perversion of truth in a public

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* This basic principle was recognized by Justice Field in his dissenting opinion in *O'Niel* v. *Vermont*, 144 U.S. 323, 339, 40 (1892):

"The inhibition (of the Eighth Amendment) is directed against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."

document, it is not greater than that which may be imposed for falsifying a single item of a public account. *And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.* The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.* at 381. (emphasis added)

Thus the Court defined disproportionality with reference to similar or more serious crimes carrying a lesser penalty. This disparity rendered the punishment cruel and unusual within the meaning of the Eighth Amendment. Judged by the comparative standard articulated in *Weems* the petitioner's sentence is grossly disproportionate to the crime of robbery.

For example, in the State of Alabama, murder in the second degree is "the unlawful killing of a human being with malice, but without deliberation or premeditation." *Miller* v. *State,* 145 Ala. 677, 40 So. 47, 48 (1906) (See also Code of Ala., Tit. 14, §314 (1959)) and it is punishable by imprisonment "for not less than ten years, at the discretion of the jury." Code of Ala., Tit. 14, §318 (1959). Thus, even though life be taken the maximum punishment is life imprisonment.

Similarly, any person convicted of mayhem (which includes such grisly deeds as maliciously and intentionally cutting out a person's tongue, putting out an eye and tearing off a limb), an assault with intent to murder, or an assault with a deadly instrument upon a peace officer in performance of his duties, can receive no higher punishment than twenty years imprisonment. Code of Ala., Tit. 14, §359 and 38 (1959) respectively.

By comparison robbery may be punished by "death or by imprisonment in the penitentiary for not less than ten years." Code of Ala., Tit. 14, §415 (1959). As Alabama retains the common law definition of robbery, the offense can consist of taking property from the person of another without any direct application of force. A "putting in fear" or mere *threat* of violence will suffice. See *Wilson* v. *State*, 268 Ala. 86, 105 So.2d 66 (1958). Thus the commission of petit larceny plus verbal threats amounting to simple assault can result in a robbery conviction in Alabama. As the death penalty may be applied to such conduct under the sentence statute, there can be no assurance of any rational relationship between the acts committed and punishment imposed. The breadth of conduct embraced by the common law definition renders the punishment capricious. The contrast between the penalty for robbery and punishments prescribed for other crimes which involve a much greater threat to life, illustrates use of the "unrestrained power" by the Alabama legislature. The Eighth Amendment reflecting fundamental concepts of human dignity demands a rational nexus between crime and punishment. See *Robinson* v. *California*, 370 U.S. 660 (1962), especially Douglas, J., concurring, 370 U.S. at 676.

As Petitioner's case exemplifies, the dangers of great disproportionality are not academic. His life is to be taken

where he himself did not take life or seriously injure. In addition, the death penalty was uniformly applied to all his offenses irrespective of the varying gravity of his conduct.

Thus, under the *Weems* formula, execution of the Petitioner is most assuredly a punishment so disproportionate to the offense as to be "cruel and unusual."

F. The Permissible Aims of Punishment May Be Achieved and Society's Needs Served by Punishing Robbery Otherwise Than by Death.

The principal objectives served by punishing an individual for the commission of a crime are: (1) *retribution*, or the vindication of the community's emotional desire to punish an offender; (2) *reformation and rehabilitation*, or the conversion of the convicted offender into a noncriminal member of society; (3) *deterrence*, or the discouragement of others from the commission of like offenses; (4) *isolation*, or the removal of the offender from society to prevent a recurrence of criminal activity during the period of confinement; and, (5) the reaffirmation of community norms in an attempt to maintain respect for law by condemnation of criminal acts. See, "Note, Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court", 16 *Stan. L. Rev.* 996, 1011-1013 (1964).

As modern penology has focused increasingly on the criminal and not merely on the nature of the crime committed, the retributive aim of punishment has fallen into disfavor.* This Court has recognized that isolation, "de-

* The highest courts of New York and California have declared that treatment of criminal offenders should be directed toward deterrence, isolation, and rehabilitation. In *People* v. *Oliver*, 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 201-202, 151 NYS 2d 367, 373

terrence and reformation" are the proper objectives of punishment rather than "retaliation and vengeance." *Morrissette* v. *United States*, 342 U.S. 246, 251 (1952); see also *Williams* v. *New York*, 337 U.S. 241, 248 (1949); and *Trop* v. *Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion of Mr. Justice Brennan).

The death penalty does not properly serve the permissible goals of isolation and rehabilitation. It is clearly excessive with regard to the former and negates any possibility of the latter.

The argument that capital punishment must be retained as a necessary deterrent to contemplated crimes has now been discredited in face of mounting evidence to the contrary.

Recent studies have shown that in comparing homicide rates in capital and non-capital jurisdictions, there is no discernible correlation between the presence of the death penalty and the homicide rate. *The Challenge of Crime in a Free Society, a Report by the President's Commission on Law Enforcement and Administration of Justice*, 143 (1967). Since only 24 people were executed in the United States for armed robbery between 1930 and 1962, it is impossible to establish that the death penalty for robbery acts as an effective deterrent. Bedau, ed., *The Death Penalty in America*, 116-17 (Rev. Ed. 1967). Severe penalties are no more an effective deterrent than mild penalties; rather the effective elements in deterring crime are the efficiency, uniformity, and certainty of enforcement

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(1956), discussing statutes reducing penalties for certain crimes, the court said: "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." See also, *In Re Estrada*, 63 Cal. 2d 740, 745, 408 P. 2d 948, 951-952, 48 Cal. Rptr. 172, 175-176 (1965).

through apprehension and conviction. See Att. Gen. Clark, Hearing on S. 1760, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

Alabama, which retains the death sentence, has one of the highest murder rates in the nation (12.9 per 100,000) while Maine, which does not employ the death sentence, has one of the lowest rates in the nation (1.1 per 100,000). Even when one compares states with similar sociological conditions there is no correlation between retention of the death penalty and the murder rate. This indicates "that the homicide rate is indifferent to the presence or absence of capital punishment." See Schuessler, "The Deterrent Influence of the Death Penalty," *Annals*, November, 1952, at 57-58.

Although there are no reliable statistics to assess the impact of the death penalty on robbery it is reasonable to assume that the situation would not vary greatly from homicide.

Thus, unless the state can demonstrate a compelling interest to justify retention of the death penalty, a penalty less than death will better serve societal needs. Abrogation of the death penalty will provide the state with an opportunity to rehabilitate the petitioner, enable him to conform his future conduct to acceptable standards, and become a useful and productive citizen.

II.

The Supreme Court of Alabama Failed to Protect Petitioner's Right to Due Process With Regard to His Plea of Guilty.

A. A Guilty Plea to Be Effective Must Be Made Voluntarily, Knowingly, and Intelligently.

A plea of guilty is the most serious form of confession which a defendant can make because it admits the truth of all the allegations in an indictment. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction").

This Court has long recognized that due process requires that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Ibid.* See also *West* v. *Myers*, 423 Pa. 1, 5-6, 22 A.2d 919, 921 (1966) ("The concept of fairness and justice embodied in the due process clause . . . is incompatible with the practice of permitting convictions based upon guilty pleas not made voluntarily . . . and no plea can be viewed as voluntary that is the product of ignorance").

A trial judge has an affirmative, constitutional duty to ascertain whether or not a guilty plea was voluntarily made. Reliance on the defendant to raise objection would make a mockery of the right to due process since the same factors which produce an involuntary confession—fear or ignorance, for example—would also prevent any such objection being made. Cf. *Carnley* v. *Cochran*, 369 U.S. 506, 514 (1962). This affirmative duty is especially crucial in

a capital case because, for example, an innocent defendant motivated by fear of the supreme penalty might plead guilty hoping to placate the authorities and avoid the horror of his own death. Cf. *United States* v. *Jackson*, 390 U.S. 570 (1968) ("... the evil in the federal statute (making possible the death penalty only after a plea of not guilty) is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them").

In an analogous situation, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that a confession is inadmissible until the prosecution establishes that it was voluntarily given. *A fortiori* voluntariness must be established as a prerequisite for the acceptance of a guilty plea which is a far more serious confession than the extra-judicial statements considered in *Miranda*. See *Kercheval* v. *United States*, *supra*.

Indeed, the due process requirements reflected in *Miranda* apply with greater force to a guilty plea because they are easier for a trial court to implement. Ascertainment of voluntariness is made in court before the judge and does not require him to investigate an event not under his control and remote in time and place. Additionally, it cannot be argued that this application of *Miranda* to guilty pleas would interfere with expeditious police investigation.

The foregoing considerations have vital relevance to the case at bar; not only is there a real doubt here whether Petitioner voluntarily, knowingly and intelligently plead guilty but also the record is entirely inadequate to permit an appellate court properly to review this fundamental question. Why would anyone plead guilty to a capital offense except as a matter of trial strategy (for example,

pursuant to an agreement with the prosecutor not to seek the death penalty)? This incongruity disturbed the three dissenting judges below. See A 41. Was Petitioner adequately advised when his court-appointed lawyer had only three short days between appointment and the time Petitioner entered his guilty plea, A 3-4, in which to identify and interview all the witnesses to five separate crimes, review the charges and prior proceedings in light of the applicable law, reflect on the awesome implications of the death penalty, consult with the prosecutor and his client, and do all the myriad other tasks necessary? All that an appellate court has to aid it in resolving these basic questions is a single, pro forma and altogether uninformative sentence in the record:

> "This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of robbery and plead guilty." (A 4)

B. The Supreme Court of Alabama Erred in Holding That Petitioner's Guilty Plea Was Voluntarily Made.

The holding of the Supreme Court of Alabama is obscure because of the silence of three of the judges in the four man majority. There seem to be at least three possible interpretations of the holding, however, and analysis of each shows reversible error.

First, it is possible that the Supreme Court of Alabama held that a trial judge has no affirmative duty to investi-

gate the voluntariness of the plea unless irregularities are apparent. In his dissenting opinion, Goodwin, J., coupled his favorable reference to the rule that a trial judge "must see to it . . . that the plea is entirely voluntary", with his apparent misgivings about the merits of this particular case (A 41). This juxtaposition might suggest that the judge has a duty to investigate voluntariness only when reasonable suspicions are aroused as here.

Referring to the language quoted above by the dissent, Lawson, J., concurring, finds that it is to the same effect as an Alabama case which provided that "(i)f it *appears* that a guilty plea is the product of coercion, . . . it is void . . ." (emphasis added) (A 40). If Judge Lawson intended to stress the italicized word, the concurring opinion might give strength to the view that the Alabama Court found that no duty to investigate arises until there is some reason to suspect involuntariness.

In light of the constitutional principles discussed in the preceding section of this Point, *supra,* it would clearly be reversible error if the Supreme Court held that a trial judge need not ascertain voluntariness unless and until his suspicions are aroused.

Second, the opinion of the Supreme Court of Alabama could be read to hold that, since the record is silent, it must be assumed that the guilty plea was voluntary. In his concurring opinion, Lawson, J., states:

> "The record contains nothing to indicate that Boykin's plea of guilty was not voluntarily and knowingly made or that it was the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence. For aught appearing,

the plea was entirely voluntary and Boykin fully realized and was competent to know and understand the possible consequences of such a plea. In briefs filed here on behalf of Boykin, by counsel who did not represent him at the trial below, it is not contended that Boykin did not voluntarily and knowingly enter the plea of guilty or that he did not fully realize the possible consequences of such plea." (A 39)

This interpretation would present a situation analogous to that in *Carnley* v. *Cochran*, 369 U.S. 506 (1962) where this Court found it improper for an appellate court to presume from a silent record the voluntary waiver of the right to counsel, saying:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Id.* at 516.

The *Carnley* rationale is controlling here, if the Supreme Court of Alabama held that the voluntariness of a guilty plea may be inferred from a silent record. The assumption necessary to sustain such a holding would have to be that none objected because there were no objections, but this presumption is vitiated when it is realized that the very forces which produce an involuntary plea (e.g. fear or ignorance) would continue through the trial, prevent the defendant from objecting, and thereby account for the silent record. See, *Id.* at 514.

Third and last, the opinion of the Supreme Court of Alabama could be read to hold that while the trial judge must investigate, the trial record need not affirmatively

show that a guilty plea was entered voluntarily. Parts of the concurring and dissenting opinions might be interpreted to indicate the court felt this to have been the issue before it. (A 39-40 and 41, respectively.)

The due process guarantee of a fair trial includes within it the guarantee of fair and meaningful appellate review. This principle, in cases involving protection of substantial constitutional rights, has led to the requirement that the trial court develop an adequate record to facilitate such appeal. For example, in *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938), the Court said:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused. . . . is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver (of counsel) by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Subsequent cases have not interpreted the last quoted clause to be precatory, for it is now well established that a trial court has an affirmative duty to make a record concerning the voluntariness of waiver of counsel. See, for example, *Glasser* v. *United States*, 315 U.S. 60, 71 (1942); *Kaplan* v. *United States*, 375 F. 2d 895 (9th Cir.), *cert. denied* 389 U.S. 839 (1967); and *United States* v. *Moriarty*, 375 F. 2d 901 (7th Cir.), *cert. denied* 388 U.S. 911 (1967). If due process requires the trial court to make a record

with respect to the voluntariness of a waiver of the right to counsel, it surely must impose a similar requirement with regard to the voluntariness of a guilty plea. At least one court has so held. *Woods* v. *Rhay*, 68 Wash. 2d 601, 414 P.2d 601, *cert. denied* 385 U.S. 905 (1966).

The rule here urged reinforces the constitutional guarantee against self-incrimination and, additionally, common sense tells us that the enormity of the implications of a guilty plea entitle the voluntariness thereof to be subject to every possible procedural safeguard.

There is no merit to the suggestion of the concurring judge (A40), that the trial court need not make a record as to voluntariness of a guilty plea on the theory that Petitioner can raise the same questions in a collateral proceeding. Forcing such a proceeding on Petitioner would be unnecessarily prejudicial to him. Failure to obtain proper stays of execution before adjudication of the issue would result in Petitioner's death. Furthermore, as the constitution does not guarantee Petitioner the right to counsel in certain collateral procedures, *e.g.*, *Douglas* v. *Maxwell*, 357 F.2d. 320 (6th Cir.), *cert. denied* 385 U.S. 858 (1966) (habeas corpus), Petitioner's indigency might prevent him from obtaining counsel and thereby effectively deny him the power to bring such a proceeding. Also, since the question of voluntariness can be resolved on appeal, to require a collateral proceeding would only place added burden on the court.

III.

The Sentence of Death Imposed on the Petitioner by the Alabama Jury Violates the Due Process Clause of the Fourteenth Amendment.

The law of Alabama dealing with robbery as a capital crime does not purport to establish any standards by which a jury is to exercise its discretion in capital sentencing. Code of Ala., Tit. 14, §415 (1959), provides that:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

The Constitution forbids a degree of vagueness in criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). Such vagueness leaves room for arbitrariness and suasion by impermissible considerations. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966) supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional. What was at issue there, as here, was a state practice governing disposition, not describing the elements of an offense. No "fair notice" problem was involved—except, of course, the problem that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried before a jury having limitless sentencing power. No First Amendment or other Federal rights demanding the special protection afforded by a heightened requirement

of statutory specificity, see *United States v. National Dairy Products Corporation*, 372 U.S. 29, 36 (1963), were involved in *Giaccio*. That decision turns squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards, . . ." see 382 U.S. 402-403, whether to impose upon a defendant a rather small item of cost. In the infinitely more significant matter of sentencing a man to death, an Alabama jury should not be permitted the same lawless and standardless freedom.

Indeed, the dangers implicit in unbridled discretion in imposing punishment are illustrated in the grim history of the discriminatory use of the death penalty in the United States. Of those convicted of intentional homicide only about one per cent are executed. This one per cent is almost universally poor, friendless, and black as has already been shown. See, Point I, *supra*. Alabama has reserved the death penalty for robbery exclusively for Negroes and eighty per cent of all executions in that state have been imposed on Negroes. *Ibid.*

The Task Force Report on The Courts of The President's Commission on Law Enforcement and Administration of Justice (1967) concluded (at p. 23) that "(t)he existence of unjustified disparity (in sentencing) has been amply demonstrated . . ."

The gross injustice which the President's Commission found at all levels of sentencing is peculiarly intolerable when it affects the application of the death penalty. This Court recently noted that "much more is involved . . . than a simple determination of sentence . . . (because the jury must) answer 'yes' or 'no' to the question whether this

defendant was fit to live". *Witherspoon* v. *Illinois*, 391 U.S. 510, 520.20 (1968). Even if the imprecision of the sentencing art and complexity of sentencing goals must allow for some degree of discretion in deciding between different fines or terms of years, the degree of arbitrariness allowed a state is not so liberal where grave and irremedial punitive exactions are at stake, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) and none is graver or more irremediable than the sentence of death. The "basic requirements of procedural fairness can(not) be ignored . . ." *Witherspoon* v. *Illinois, supra.*

Here, the range of discretion granted to the Alabama jury by statute was impermissibly broad. They were invited to choose, in their absolute discretion, between such disparate punishments as ten years imprisonment or death.

The trial court provided the jury with no guidance whatsoever to help them decide whether the Petitioner should live or die. By his apparent indifference to the need for sentencing standards, the judge allowed the choice between life and death to be made for any reason, rational or irrational, or for no reason at all. His charge gave no assurance that there would be the slightest connection between the sentence and any permissible justification for enacting it:

> "The Court: Some of you gentlemen were on the (fol. 23) jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now, robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That

boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict. Do you have any exceptions as to what the court has said?

Mr. Austill: No, sir.

Mr. Pfleger: None for the State. (A 32)

To make a choice between a relative minor prison term and the absolute extinguishment of life without any standards invites irrationality, caprice, and invidious discrimination. Cf. *Skinner* v. *Oklahoma, supra*. The jury have acted wilfully and unreviewably,* without standards and without direction.

The imposition of the death penalty on the Petitioner pursuant to such an arbitrary procedure is unconstitutional.

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*Alabama courts have recently reaffirmed that the exercise of discretion under the robbery sentencing statute is within the exclusive preserve of the jury and its decision cannot be reviewed or modified by the courts. See *Wilson* v. *State*, 268 Ala. 86, 105 So. 2d 66 (1958), and *Argo* v. *State*, 43 Ala. App. 546, 195 So. 2d 901 (1967).

Summary and Conclusion

Review of errors predicated on the judgment and opinion of the Supreme Court of Alabama in the instant proceeding is vital and necessary if we, as a Nation, moored to sound principles of jurisprudence, are to rise above the tide of out-moded procedures and doctrinaire visage. The meaningful provisions of the Eighth and Fourteenth Amendments to our Constitution do not reflect a vacuous dubidity or abstractional commitment, but, rather, are instruments mirrored to this Country's evolving concept of decency and fairness. The trend toward the abolition of the death penalty is one facet of the outlook within this developing society. And pointedly, with regard to the Petitioner, Edward Boykin, Jr., stripped of the impractical realities that have brought him to this time and place, the crimes for which he awaits execution neither call for nor require society's measure to be so greatly disproportionate.

It is also contended that procedural safeguards within an enlightened and vitalizing juridical framework will make more certain and effective the rights with which the individual citizen is clothed. That his liberty, or his property, or in this case, his very life, will not be denied without a clear confirmation of those guarantees.

For the reasons stated, the judgment appealed from should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 642

EDWARD BOYKIN, JR.,

PETITIONER

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT

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BRIEF AND ARGUMENT ON THE MERITS BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Edward Boykin, Jr., v. State, 1st Div. 403, 207 So. 2d 412, 416. The decision of the Honorable Court granting Certiorari is reported at 21 L. Ed. 2d 93.

II

JURISDICTION

The petitioner has been granted a writ of certiorari from the Supreme Court of the United States to review the judg-

ment of the Supreme Court of Alabama, rendered on February 8, 1968; rehearing was denied March 7, 1968, 207 So. 2d 412, 416. Petitioner applied under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Does imposition of the death penalty upon conviction for robbery violate the Eighth and Fourteenth Amendments?

2. Did the trial court fail to protect petitioner's right to due process with regard to his plea of guilty?

3. Does the finding of guilty and punishment within the limits set by the statute violate due process in the absence of a statute providing for separate juries to render verdicts and assess punishment?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eighth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Mobile County, Alabama, of robbery.

The record discloses that defendant was represented by court-appointed counsel and pleaded guilty to five separate indictments charging him with committing five separate

robberies respectively. Jury verdict was guilty of robbery, as charged in the indictment, on his plea of guilty and finding that he suffer death by electrocution. Sentence of death by electrocution was pronounced by the Court (R. pp. 6-8).

VI

SUMMARY OF ARGUMENT

Imposition of the death penalty upon conviction for robbery is not cruel and unusual punishment violative of the Eighth and Fourteenth Amendments when the sentence is within the limits set by State statute.

There is no requirement of affirmatively showing that the trial judge did not accept a plea of guilty until after determining that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea.

The finding of guilty and setting punishment by the same jury, in the absence of a statute providing for separate juries for each of these functions, does not violate due process.

VII

ARGUMENT

Petitioner argues at some length that the imposition of the death penalty upon conviction of robbery is cruel and unusual punishment violative of the Eighth and Fourteenth Amendments.

Title 14, Section 415, Code of Alabama 1940, provides that "any person convicted of robbery, shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

Robbery is a common law crime and is the felonious taking of money, or goods of value from the person of another,

or in his presence, by violence to his person, or by putting him in fear. There is no statutory robbery in Alabama, and the State of Alabama adopted the common law of England, where not inconsistent with the Constitution, laws and institutions of this State, to continue in force until altered or repealed by the Legislature (Title 1, Section 3, Code of Alabama 1940).

The Supreme Court of Alabama in affirming the case now on certiorari to this Honorable Court, *Edward Boykin, Jr., v. State of Alabama*, 207 So. 2d 412, 416, held:

> "Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. Franklin v. Brown, 73 W. Va. 727, 729, 81 S. E. 405, L.R.A. 1915C 557. In Laws of Alabama, 1823, page 207, the punishment for robbery was death. In the Code of 1852, § 3104, page 563, punishment was ten years' imprisonment. Since the Revised Code of 1867, § 3668, any person convicted of robbery, must be punished, at the discretion of the jury, either by death, or by imprisonment for not less than ten years; or, as in Code 1886, § 3742, by death or by imprisonment for not less than five years; or, as in Code 1896, § 5479, and subsequent codes, by death or by imprisonment for not less than ten years."

This Honorable Court in *Weems v. United States*, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544, discussed cruel and unusual punishment, holding;

> "What constitutes cruel and unusual has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like.
>
> . . . . . .
>
> "This court's final commentary was that 'difficulty would attend the effort to define with exactness the extent of

the constitutional provision which provides that cruel and unsual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution. Cooley, Const. Lim. 4th ed. 408; Wharton, Crim. Law, 7th ed. § 3405.'

"That passage was quoted in Re Kemmler, 136 U.S. 436, 447, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, and this comment was made: 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life.' The case was an application for habeas corpus, and went off on a question of jurisdiction, this court holding that the 8th Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel 371] and unusual *punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging."

As was pointed out earlier the statutory punishment in Alabama upon conviction of robbery is punishment, at the discretion of the jury, by death, or imprisonment in the penitentiary for not less than ten years.

Where the sentence imposed is within the limits prescribed by statute for the offense committed, it ordinarily will not be regarded as cruel and unusual. *U. S. v. Sorcey*, 151 F. 2d 899, Cert. Den. 66 S. Ct. 821, 327 U.S. 794, 90 L. Ed. 1021.

It is noted that the cases set out in Appendix "B" of amicus curiae brief, *In Re Robert Page Anderson*, Crim. 11572 and *In Re Frederick Saterfield*, Crim. 11573, disagree with the petitioner's contentions. There the majority opinion held:

"The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual.' (People v. Tanner, 3 Cal. 2d 279, 298; People v. Keller, 245 Cal. App. 2d 711, 714-715.) In Trop v. Dulles, supra (1958) 356 U.S. 86, 99 (plurality opinion), which concluded that denationalization for wartime desertion constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, it was stated, '[L]et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

The same case held that, "Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

Respondent respectfully submits that this adequately explains away any possible contention that a code section is unconstitutional because of vagueness in allowing the jury to assess punishment without mention of standards for the exercise of that discretion.

Petitioner places some reliance on *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, wherein

a statute permitting a jury to assess costs against an acquitted defendant was held constitutionally invalid because of vagueness and the absence of any standards sufficient to enable a defendant to protect himself against arbitrary and discriminatory imposition of costs. However, this Honorable Court held in footnote 8:

> "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice in many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."

Alabama has had the practice in robbery trials of the jury finding the verdict and fixing the punishment within the limits set out by the Code for many years. Respondent submits that such procedure is not violative of any constitutional rights of the accused.

What group is better able to arrive at the correct amount of punishment than the jury which heard the evidence, had been afforded the opportunity to see and hear the witnesses and pass on their credibility, and from the evidence determine the gravity of the crime and whether the accused is guilty. It is obvious that the same jury which heard the evidence and returned the verdict is in better position to fix the punishment as befits the gravity of the offense than a jury who merely is called in to fix punishment.

As usual in cases where the defendant is a Negro, effort has been made to show racial discrimination in the giving of the death penalty in cases of robbery convictions. Figures are cited which disclose that 5 Negroes were executed for robbery in Alabama from 1932 to 1962 and another set that 5 Negroes were executed from 1932 to 1967 and no whites. Respondent points out that only one person has been executed in Alabama for robbery in the last six years. James W. Coberly, a white man, was executed on September 4, 1964. No Negroes were executed for robbery during that period.

The principal objectives served by punishing an individual for commission of a crime are (1) punishment of the individual for commission of the crime (2) rehabilitation where in order, and (3) deterrence of others from commission of such crime.

Granted that the death penalty is the maximum punishment, and, of course, does away with any rehabilitation of that particular criminal, the deterrent factor is very important.

This case now before this Honorable Court is a fine example of such conviction and legal sentence serving as a deterrent to robbery in a city. Mobile had just experienced a series of such robberies and storekeepers were aroused and were arming themselves to defend their property and put an end to this reign of terror by lawless individuals. After the trial and conviction of Edward Boykin, Jr. the deterrent effect was a cessation of such robberies.

Petitioner, in his brief, has pointed out that there was a violent death as a result of the robbery in *Cobern v. State*, 278 Ala. 547, 142 So. 2d 869. That is true. Cobern killed his victim. The State of Alabama had two indictments against Cobern—one for murder and one for robbery. Because the victim was the girl friend of Cobern, a married man, there was a possibility that a good trial attorney would get Cobern off with a second degree murder or manslaughter conviction. The State prosecuted the robbery case and Cobern was convicted, sentenced to death and executed on September 4, 1964.

The people of Alabama and most of the rest of the people of the United States regard robbery as a very serious crime. Alabama regards it as a capital offense.

Respondant disagrees with petitioner that legislation should be enacted to change the sentence imposed upon the one convicted of robbery.

The present law provides a minimum punishment of ten years and permits a greater sentence up to the death penalty in aggrayated cases where there is serious injury or disregard for human life. Boykin shot one little girl and showed a flagrant disregard for human life by firing into the stores when leaving. He and the people of Mobile are fortunate that he did not kill anyone.

Seldom does one encounter a weaker case than this one on behalf of abolition of the death penalty. He should be punished. Rehabilitation is out of the question. His legal execution will serve as a deterrent to those who regard such things as robbery, arson, looting, etc. as a way of life and an exercise of their "rights."

Petitioner argues that the trial court erred in accepting the guilty plea without first ascertaining whether or not a guilty plea was voluntarily made.

> "Rule 11 of the Federal Rules of Criminal Procedure provides that the court 'may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.' While no particular ritual need be observed by the trial court, such as a formal finding or recitation that the plea was entered with understanding, an affirmative duty nonetheless exists on the part of the trial court to advise the accused fully and not merely perfunctorily as to what acts are necessary to establish guilt, and to do all it can to make reasonably certain that a plea of guilty represents the free and voluntary act of one who fully understands the nature of the charge and the consequences of his plea. . . ."
> *Hulsey v. United States*, 369 F. 2d 284 (1966).

97 A. L. R. 2d, pages 556, 557, state that the trial court is not relieved of the duty of ascertaining the consequences of his plea and of advising him of such consequences if he is

not so informed, even if the defendant is represented by counsel. Among the cases cited thereunder is *Bullock* v. *Harpole*, 233 Miss. 436, 102 So. 2d 687, which held:

"[2,3] In answer to that contention, we say that it was the duty of the Circuit Court of George County, before accepting the appellant's plea of guilty in this case, to determine that the applicant entered the plea of guilty freely and voluntarily, and that he was competent to know and understand the consequences of his act. But we have no statute which requires that the judgment of the court contain a finding that these rules of procedure have been complied with before such plea of guilty can be accepted and final judgment entered thereon. The judgment itself raises a presumption that what ought to have been done by the trial judge with respect to receiving such plea was done; and, in the absence of any showing to the contrary, we must assume that the trial judge saw to it that the plea was voluntary, and that the defendant fully realized, and was competent to know the consequences of such plea. State v. Hill, 81 W. Va. 676, 95 S.E. 21, 6 A.L.R. 687. ... ."

Alabama has no explicit statutory requirements as to the trial court's duty to admonish the defendant of the consequence of his plea of guilty as have Colorado, Illinois, Texas and others. The duty of the trial court in Alabama is set out in Title 15, Section 277, Code of Alabama 1940, as follows:

"§ 277. When prisoner pleads guilty.—If he pleads guilty, no special venire need be drawn, but the court must cause the punishment to be determined by a jury, except where the punishment is by law required to be fixed by the court, and may, in all cases which a plea of guilty is entered, cause witnesses to be examined, to ascertain the character of the offense."

Justice Lawson, concurring specially in this case, held as follows:

"I am not familiar with any holding of this court to the effect that when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determining that the plea was voluntarily and knowingly entered by the defendant and that the defendant fully realized and was competent to know the consequences of such a plea. And such is not, in my opinion, the holdings of the Mississippi Supreme Court in Dickinson v. State, 202 Miss. 804, 32 So. 2d 881, and Yates v. State, 251 Miss. 376, 169 So. 2d 792, cited and relied upon in the dissenting opinion.

"In Howard v. State (Ala. Sup. Ct.), 194 So. 2d 834, in reviewing the action of a trial court in a post conviction proceeding, we observed: 'An accused's plea of guilty may be accepted only if it is made voluntarily and knowingly. If it appears that a guilty plea is the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertance, it is void since it is a violation of constitutional safeguards.' (194 So. 2d, 837-838). In my opinion the language just quoted is to the same effect as that quoted in the dissenting opinion from Yates v. State of Mississippi, supra.

"Of course, a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant. But neither the Howard case, supra, nor the Mississippi cases, supra, hold that the record must affirmatively show that the trial judge made such a determination. The effect of the dissenting opinion is to presume that the trial judge failed to do his duty.

"If the trial court did fail to make such an ascertainment, or if the appellant, Boykin, was not adequately represented in the court below, or if because of his youth or ignorance he was unable to fully comprehend the possible effect of having all five cases tried before the same unstruck jury, he can raise any or all of those questions in a petition or writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions. But, in my opinion, there is nothing in this record which would justify a reversal of any of those possible contentions."

It is respectfully pointed out that the petitioner had court-appointed counsel, Evan Austil (R. p. 3). The cases cited by petitioner having to do with waiver of counsel are inapplicable. Also, an attempt to put a Miranda tag on this case is not applicable. *Miranda v. Arizona*, 384 U.S. 436, had to do with constitutional warnings prior to questioning a suspect to get him to confess to a crime.

As the Supreme Court of Alabama pointed out if the trial court failed to ascertain the voluntariness of the plea, or if defendant failed to comprehend the effect of all five cases being tried before an unstruck jury, or if he considered counsel inadequate, he could raise these points on coram nobis. Title 15, Section 318 (1-12), Code of Alabama 1940, as amended, provides for appointed counsel on such hearings. Also, federal habeas corpus is available and the District Judge always appoints counsel for such hearings.

The Supreme Court of Alabama, under the Automatic Appeal Statute, Title 15, Section 382(1-13), Code of Alabama 1940, as amended, is required to carefully examine record for any reversible error, whether called to their attention or not. They found none and affirmed the case.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried, convicted and sentenced properly and that neither the Eighth nor Fourteenth Amendments to the Constitution was violated in the trial of the petitioner. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of December, 1968, I served a copy of the foregoing brief and argument of respondent on writ of certiorari on one [illegible] attorneys for the petitioner, and one of the attorneys for [illegible].A.C.P., Legal Defense and Educational Fund Inc. and National Office for the Rights of the Indigent, by mailing a copy in a duly

addressed envelope to said attorney of record, and amicus curiae as follows:

To: Honorable E. Graham Gibbons
P. O. Box 293
Mobile, Alabama 36601

Honorable Jack Greenberg
10 Columbus Circle
New York, New York 10019

David W. Clark

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IN THE

Supreme Court of the United States

October Term, 1968
No. 642

EDWARD BOYKIN, JR., *Petitioner,*

vs.

STATE OF ALABAMA, *Respondent.*

On Writ of Certiorari to the Supreme Court of Alabama.

Motion for Special Leave to File Brief as Amici Curiae.

Gerald H. Gottlieb and Earl Klein respectfully move this Court for special leave to file the accompanying brief in this case as *amici curiae,* and for further special leave to file a Volume Two as described hereafter, upon order of the Court.

Inadequate briefing of the issue of unconstitutional cruelty of the death penalty prompts this motion by:

Gerald H. Gottlieb:

—member of the Bars of the Supreme Court of the United States and of California;

—consultant to the Center for the Study of Democratic Institutions;

—author of "Testing the Death Penalty" (publication in 1959—mimeographed; 1961—Appendix A, *infra,* 1963—in *Death Penalty in*

America) proposing that an evidentiary test of the death penalty be made and setting out the evidentiary categories (Appendix A, *infra*);

—author of "On Capital Punishment" (publication 1967, Center for the Study of Democratic Institutions, Appendix B *infra*, 1969 in Journal of Crime and Delinquency), reviewing some of the evidence within those categories (Appendix B *infra*);

—moderator of symposia (at the Center) in 1967 among leading members of various applicable disciplines, gathering the facts on the death penalty;

—counsel (amicus) in the presentation of evidence on the death penalty in *People v. Thornton*, Los Angeles Superior Court in 1967;

—counsel in presentation and argument as *amicus curiae*, dealing with fact and law of death penalty in cases of *In re Anderson* and *In re Saterfield* in the California Supreme Court;

—a director, since 1959, of American Civil Liberties Union of Southern California; proposed (1959) that National ACLU challenge the death penalty on evidentiary grounds, as cruel.

Earl Klein:

—counsel for the past eight years for prisoners on California's Death Row;

—member of the Bars of the Supreme Court of the United States and California;

—counsel in presentation of *amici curiae* brief in cases of *In re Anderson* and *In re Saterfield* in the California Supreme Court;

for special leave to file the attached brief as *amici curiae;* and for further special leave to file upon order of this Court an extensive presentation as Volume Two* of the brief, analyzing the facts and applicable law with respect to the institution of "capital punishment" and the scope of the term "cruel" as it is used in the Eighth Amendment to the United States Constitution.

The question of whether the death penalty is unconstitutionally cruel, it is respectfully urged, is one of the most important questions to reach the Supreme Court in recent decades.

Volume Two's fact and law material on the death penalty has been compiled and classified. However, since it will comprise some 175 pages, and will necessitate additional time for printing, it cannot be filed concurrently with the attached brief; hence special leave is requested to file Volume Two upon order of the Court.

Substantially none of the matters outlined in the attached brief have been covered in briefs already on file with the Court.

It is the position of *amici* that the death penalty is the most dramatic symbol of barbarism present in the United States at this time, and until the question of its constitutionality is disposed of, progress with respect to the constitutional testing of other matters relating to punishment will be forestalled.

The public interest will be served by permitting *amici* to set out an extensive presentation of fact and law on the issue because:

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*Volume Two of our amicus brief is not filed herewith; it will be filed upon grant of permission by the Court.

1. The continued practice of capital punishment affects the character of our society, and prevents full application of the standards of decency consistent with a democratic government;

2. Capital punishment tends to prevent the Eighth Amendment to the United States Constitution from being an effective part of that living instrument for the clear reason that until Death Rows and the death penalty are obliterated, practices less than this maximally cruel institution will not generally be able to be reached;

3. If the death penalty's unconstitutionality is to be found, certainly it ought to be found in a case in which the crime is less than murder, namely, as here, robbery.

Consent to file the attached brief has been given by counsel for the parties, who have advised *amici* that they will file such consents with the clerk of the Court.

This matter was brought to the attention of *amici* only during the present month of April. Immediately upon learning of the case and receiving copies of briefs *amici* have hastened preparations on this motion.

Dated: April 30, 1969.

Respectfully submitted,

GERALD H. GOTTLIEB and
EARL KLEIN,

By GERALD H. GOTTLIEB,
Amici Curiae.

IN THE

Supreme Court of the United States

October Term, 1968
No. 642

EDWARD BOYKIN, JR.,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

Brief of Gerald H. Gottlieb and Earl Klein as Amici Curiae.

Interest of Amici.

Gerald H. Gottlieb and Earl Klein are members of the bars of the Supreme Court of the United States and of California. Both have represented prisoners under penalty of death and have presented arguments to courts of California on the issue of capital punishment.

Mr. Gottlieb's interest commenced 17 years ago when he began a study of the death penalty, which led to his proposal made in 1959 to the American Civil Liberties Union and led in 1961 to publication of the article "Testing the Death Penalty" in the Southern California Law Review.* His study continued through

*In the anthology "The Death Penalty in America," the Editor Hugo Bedau, refers to Gottlieb's article as the first to spell out an entire argument against the death penalty on constitutional grounds. Page 170.

the years and in 1967, he authored a paper for the Center for the Study of Democratic Institutions entitled "On Capital Punishment." In 1967, he moderated a symposium at the Center among members of various applicable disciplines in which the facts on the death penalty were gathered. Later that year, Mr. Gottlieb was counsel (*amicus*) in the penalty phase of *People v. Thornton,* in Los Angeles Superior Court, during which the evidentiary facts on capital punishment were presented through expert witnesses.

Mr. Klein has been counsel for prisoners on Death Row at San Quentin since 1961.

In 1968, *amici* prepared and filed with the California Supreme Court, an extensive *amicus* brief of fact and law on the death penalty in the cases of *In re Anderson* and *In re Saterfield.*

Argument.

This brief is directed to the following question: Whether Boykin's sentence of death for the crime of simple robbery violates the prohibition against cruel and unusual punishments contained in the Eighth and Fourteenth Amendments.

Briefly stated, *amici* will show the following: The death penalty is torture. It serves no other purpose than revenge. Revenge is an unconstitutional purpose. Torture is an unconstitutional act. The anguish of the 1000 Death Row days ending in death is incomparably cruel.

The particularities that demonstrate these matters are indicated in part in Appendices A and B hereof, and in extensive detail in Volume Two (to be filed upon

receiving permission of the Court under pending motion). In the next several pages we trace, broadly, the matters dealt with in detail in the appendices hereto, and in Volume Two. (Reference, hereinbelow, is made to parts of the Appendices A and B hereof. Volume II, subject to, this pending motion, will present, with particularity, the law and fact as to each of the following points.)

I.

To ask a Court to consider the cruelty of the death penalty as a question of fact is to ask the Court to do what is required by law. If the death penalty is found to be in fact cruel, the Court must wield the Eighth Amendment to strike down this penalty, for the guarantee against cruel punishment is fundamental.

The burden to determine cruelty of capital punishment cannot be escaped by merely designating the question to be political. Having found cruelty, the Court must strike down capital punishment.

Appendix A, Sec. VIII.

II.

Congressional debate at the time of congressional approval of the Eighth Amendment, and the Congressional intent as found in decisions of this Court, demonstrate that the Eighth Amendment is available as a weapon to strike down cruelty in any form, and is potentially applicable to the mental and physical aspects of Death Rows and the death penalty.

Appendix A, Sec. VII; Appendix B, Postscript.

III.

"Cruelty" is to be defined not in terms of the excesses existing when the term was inserted in the Bill of Rights, but rather in terms of the contemporaneous condition of society.

The scope of the word "cruel", as it has expanded over the centuries, is to be measured by considering society's various pursuits, Consideration of how society has treated its offspring, its seamen, its accused persons, its working females, its cripples, its pupils, its industrial and agricultural workers, its insanes, *et cetera,* in earlier times and at present, are part of the demonstration of the present scope of "cruel" as a category within the Eighth Amendment. If the Court within the rubric of "cruelty", applies the term in its matured meaning, it will sweep away the Death Rows and the death penalty.

Appendix B, Sec. 1.

IV.

Revenge is no longer an accepted objective of punishment. Of the remaining objectives, rehabilitation is negated by death, removal is equally accomplished by imprisonment, and the presence of Death Rows and the death penalty in various states demonstrates no reduction in the applicable crimes, and indeed, correlates with higher incidence of those crimes.

Accordingly, capital punishment serves no permissible objective of punishment; hence is cruel by definition.

Appendix A, Sec. IV; Appendix B, Introduction.

V.

A primary definition of cruelty is "the infliction of pain or loss without necessity or justification". Since no acceptable purposes are served by the death penalty, no necessity can be demonstrated within contemplation of law, and the death penalty therefore must be held to be cruel, again, by definition.

The United States Supreme Court has already indicated that unnecessary pain and loss in the manner of infliction of the death penalty is "cruelty".

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).

Without a finding of necessity for the death penalty, it must be struck down; this accords as well with these philosophers whose writings are the heritage of the democratic tradition of this nation.

Appendix A, Sec. III; Appendix B, Sec. VI.

VI.

If the death penalty violates the dignity of mankind, it must be struck down. The basic concept underlying the Eighth Amendment "is nothing less than the dignity of man."

Trop v. Dulles, 356 U.S. 86, 100 (1958).

(Extensive evidence on the indignity of the death penalty will be set forth in Volume Two of this brief, which, as noted above, awaits the granting of motion for leave for the filing thereof.)

VII.

If Death Rows or the death sentence are repugnant to the "evolving standards of decency that mark" the progress of society, then those practices must fall under the Eighth Amendment. The death penalty should be held unconstitutional today within the context of the social and cultural conditions of this nation and of the world.

The facts thereof refer *inter alia* to the injuries to the society, to the family of the executed man, and to the manner and effect of the infliction of the 1000 days and nights, and of the death penalty upon the condemned. A part of the evidence showing indecency involves the concealed and clandestine manner of infliction of the penalty, an increasing circumstance in modern times.

Appendix A, Sec. II; Appendix B, Sec. III.

VIII.

The impact of the penalty of death on the relatives of the condemned is ineffable, and is one of the significant secondary inflictions that weigh in the direction of "cruelty."

The effect on the children, the parents, the other relatives, themselves innocent, finds no proper response in the fact that the original crime may have meant the sacrifice of an innocent person, for this type of response cannot even find a basis in the concept of revenge, itself no longer a proper consideration for punishment.

Appendix B, Sec. V.

IX.

The brutality of the death penalty and its effect in arousing the more bestial aspects of humanity, are historically noted facts. Moreover, historically, the more harsh and more severe the scale of punishment, the more degraded is the society found to be, as a correlative thereof.

The act by the state tends to cheapen the values that refer to humanity itself, and tends to diminish the standards of decency and conscience of the host society.

Appendix B, Secs. III, V, and VIII.

X.

Under the pressure of the pendency of death, self-mutilation is a frequent occurrence, both in attempted suicide, and otherwise. Morover, in the death process itself, physical pain is indicated to be present.

Appendix B, Sec. IV.

XI.

Mental pain and anguish, in its most extreme forms and to the most exquisite degree, is evident.

Appendix B, Sec. IV, and extensively in Volume Two of the brief.

XII.

In absolute terms, the death penalty constitutes torture. The evidence of this will be extensively shown in testimony and quoted writings, set out in Volume Two of the brief of these *amici*, the filing of which volume awaits ruling by the Court on the pending motion.

That evidence will show that the death penalty fits within the category of torture; it drives men mad and to suicide. The anguish of the 1000 days on condemned row constitutes a web of suffering for each condemned man, for although he lives in isolation, yet he shares the distress of his fellow inmates. The punctuation each of their lives, by the crises of the sufferings of the others, is described as "piecemeal dying", and a death that comes "day by day, week by week, yearly", according to the most experienced of the chaplains of San Quentin. (Volume Two of this brief*).

The fact of torture is also shown by physicians, psychiatrists and others in attendance, and by others with expert relevant knowledge.

XIII.

If, under one of the primary definitions of cruelty, the test of necessity is applied, the deprivation of life as the culmination of the Death Row process must, because of lack of showing of necessity, be found cruel.

Appendix A, Sec. III; Appendix B, Sec. VI.

XIV.

The world trend today is toward abolition of capital punishment. This is true state by state, federally in the conduct of penal institutions, and across the nations of the world.

*Unfiled, awaiting ruling on pending motion.

Moreover, the expressions by men of wisdom, the great leaders of humanity over the ages, shows an increasing trend to consider the death penalty to be nothing but a part of barbarism, beyond the pale of civilized standards.

Appendix B, Sec. VII.

XV.

One of the ways in which the cruelty of the death penalty is brought into unambiguous focus is by noting that the suffering attendant upon the 1000 days and the death is incomparable; is not matched by any other experience in human activity.

Thus the extremities observed by priests attending parishioners, by physicians attending patients in their most aggravated and painful conditions, of prisoners looking forward to life imprisonment without parole, and of excommunication, have a volume and quantity of anguish less than that noted with respect to capital punishment and its attendant procedures and duration.

The evidence on this matter will be presented in detail in Volume Two of the brief of these *amici*.

Conclusion.

Together, considerations of fact and law, in the appendices of this Volume One and in the detailed showing which these *amici* seek to make upon permission to file Volume Two, demonstrate and will further demonstrate that the death penalty is unconstitutionally cruel.

Moreover, noting that the conviction of Boykin was for a crime in which no life was lost, the force of the facts and law gains a special emphasis. The Eighth Amendment applies to the states by way of the Fourteenth Amendment as held by this Court in *Robinson v. California,* 370 U.S. 660. The sentence of death against Boykin should, we respectfully urge, be held illegal.

Respectfully submitted,

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APPENDIX A.

[Vol. 34, So. Cal. L. Rev. 268, Spring 1961]

TESTING THE DEATH PENALTY

Gerald H. Gottlieb

On the frontiers of public law are to be found issues with special characteristics. The issues hinge on certain ambiguous phrases found in constitutions, treaties and statutes. The meanings of the phrases depend upon changing and dynamic realities of society. These dynamic realities consist, among other things, of the formation and decay of values, the advance of education, increases in knowledge of the human mind and motivations, the continuing evolution of the American economic system, and our developing national self-consciousness vis-à-vis the image of our nation in a world society.

Potentially the issues are thus latently governed by the leverages of social change. The courts, on rare occasions, have redefined the ambiguous phrases.[1] The changed rules of law each time have in turn crystallized new standards and new value for society.

When these changed standards are recognized and understood by society, through pronouncement and enforcement, the realities of society are in turn affected. A churning action operates; the issues communicate be-

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[1]See, Brown v. Board of Education, 347 U.S. 483 (1953); Muller v. Oregon, 208 U.S. 412 (1908); Durham v. United States, 237 F.2d 760 (D.C. Cir. 1956); Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

It has been argued that ambiguous terms in statutes or constitutional provisions are often used purposely by legislatures; they are in effect delegating powers to the courts. See Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Va. L.R. 23, 39.

tween the basic notions of the law and the basic realities of society. Ultimately, the philosophies of the citizenry are thereby modified. Those legal issues which thus deeply affect and are affected by the philosophies, conditions and values of mankind can be referred to as the "issues-with-leverage."

Within the field of crime and punishment resides one of these "issues with-leverage." The issue hinges on the phrase, "cruel and unusual punishment," which the federal constitution's Eighth Amendment prohibits the federal government from inflicting. This phrase also may apply to state governments, since there is substantial authority to the effect that the Eighth Amendment is deemed incorporated within the due process clause of the Fourteenth Amendment, and that, through the impact of the Fourteenth Amendment upon the states, the states are thereby, albeit indirectly, to a great extent subject to the same inhibitions against cruel and unusual punishment as is the federal government.[2] Also, many states are subject to this limitation because of express prohibitions in their state constitutions similar to the Eighth Amendment.

The Eighth Amendment uses "cruel and unusual," speaking in the conjunctive. However, there is indica-

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[2]Mr. Justice Douglas has stated that: "The infliction of 'cruel and unusual punishments' against the command of the Eighth Amendment is a violation of the Due Process Clause of the Fourteenth Amendment, whether that clause be construed as incorpofating the entire Bill of Rights or only some of its guarantees. . . . For despite Hurtado and Twining, this Court has now held that the Fourteenth Amendment protects from State invasion the following 'fundamental' rights safeguarded by the Bill of Rights . . . at the very least, certain types of cruel and unusual punishment. . . ." Sweeney v. Woodall, 344 U.S. 86, (1952) (dissent). See also NAACP v. Williams, 359 U.S. 550, 551 (1959) (separate opinion).

tion in court decisions that this phrase is intended as disjunctive.[3] The California Constitution is expressly in the disjunctive, enjoining "cruel or unusual" punishment.[4]

I. CAPITAL PUNISHMENT: A MEASURE FOR CRUEL AND UNUSUAL PUNISHMENT

The phrase "cruel and unusual" is profoundly ambiguous. It refers to certain dynamic realities of society and of men's states of mind. Although those realities have been changing during the many centuries since the phrase was coined, judicial definition of the phrase in terms of contemporary society has only recently begun and is incomplete.

One of the punishments yet fully to be tested under the Eighth Amendment, within the context and findings of modern penology, psychology, morals and social requirements, is the death penalty. To proceed

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[3]"Generally viewing the action of the States in their bills of right as to the prohibition against inhuman or cruel and unusual punishments, it is true to say that these provisions substantially conform to the English bill of rights and to the provisions of the Eighth Amendment we are considering, some using the expression cruel and unusual, *others the more accurate expression 'cruel or unusual,'* and some cruel only. . . . It is true that when the reasoning employed in the various cases is critically examined a difference of conception will be manifested as to the occasion for the adoption of the English bill of rights and of the remedy which it provided. Generally speaking, when carefully analyzed, it will be seen that this difference was occasioned by treating the provision against cruel and unusual punishment as *conjunctive* rather than *disjunctive, thereby overlooking the fact, which I think has been previously demonstrated to be the case,* that the term unusual, as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to *restrain the courts,* under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power. . . ." Weems v. United States, 217 U.S. 349, 401 (1910) (dissent). (Emphasis added.)

[4]CAL. CONST. art. 1, §6.

with such a test would seem important, if for no other reason that this penalty is practiced by the federal government and forty-one of our states.[5]

The constitutionality of the death penalty in the present social setting comprises a substantial and justiciable question and it may tenably be urged that capital punishment is unconstitutional. Capital punishment may, on a sufficient factual showing, be found violative of the Eighth Amendment, since death by means of the gas chamber, gun, rope or electric chair may now with good reason be alleged to be "cruel and unusual" punishment and within the reach of the Eighth Amendment and its state counterparts. An issue of law dependent upon judicially noticeable facts awaits its day in court.

The thesis that the constitutionality of capital punishment is now a substantial question rests in part on decisional law that has defined and explored the notion of cruelty in the Eighth Amendment and the notion of due process in the Fourteenth Amendment in relation to punishment. This thesis is also partially supported by the observations of society from the sixteenth century onward. These observations assist in showing changes in man's consciousness and morality relevant to the concepts expressed in court opinions.

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[5]Nine states have abolished the death penalty: Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin. Of the others 22 and the District of Columbia practice electrocution, 12 use lethal gas, 6 use hanging, and in Utah the condemned man has his choice of hanging or shooting. Hanging is the method of execution in the territories of American Samoa, Guam, and the Canal Zone. The federal courts use the method of execution followed by the state in which the sentence is imposed, and if the state does not have a death penalty, the federal judge may prescribe the method for carrying out the death sentence. INFORMATION PLEASE ALMANAC 335 (1960).

Does the death penalty constitute such cruelty as violates the United States Constitution? What measurement shall determine this? Who shall take the measurement? Has the measurement been changed? Does it change?

In past rulings of the United States Supreme Court and state courts, the judges have declined to hold the death penalty to be illegal. However, careful review of the opinions and close analysis of the language of the decisions support the view that the constitutionality of capital punishment depends on questions of judicially noticeable fact. The evidence, responding to the language and opinions of the judges, has not heretofore been presented in any of our courts.

A number of alternate criteria may be applied in a test of the death penalty as a "cruel and unusual" punishment. The judges from time to time have given various definitions to the phrase. Any one of the definitions may become the hinge on which the ultimate question of unconstitutional cruelty may turn. The succeeding sections of this article deal each with one of those hinging definitions and frame one of those testing questions.

II. DECENCY AS A MEASURE

The sentence of death violates the Eighth Amendment to the United States Constitution if the sentence and its execution are repugnant to the evolving standards of decency that mark the progress of our maturing society.

Although expressions by intellectual and moral leaders on criminal punishment have gradually changed over the centuries, the law has only recently begun to

reflect those changes. In one line of cases the phrase "cruel and unusual" in the Eighth Amendment has been defined against the context of the practices carried on several centuries ago. Alongside that static view, today a new view has grown in the law.

The former view is exemplified by an 1890 case, *Ex parte Kemmler*.[6] In that case the United States Supreme Court affirmed that New York's electric chair could be used in administering the death penalty and that the electrocution process did not violate the United States Constitution. The Court held that only such extreme penalties as "burning at the stake, crucifixion, breaking on the wheel, or the like"[7] were within the constitutional prohibition. As recently as 1947, the Supreme Court followed the static view of "cruel and unusual." In the *Resweber* case,[8] the Court sanctioned the return of a condemned man to the electric chair after two abortive attempts at electrocution had failed. In its decision the Court mentioned that the phrase "cruel and unusual punishment" came from the English Bill of Rights of 1688.

However, it should be noted that the period prior to the adoption of our Bill of Rights was marked by a catalogue of cruelties that were unspeakable and disgusting. For example, the philosopher Michel de Montaigne writing of a Roman execution at the end of the sixteenth century stated that the convicted robber was strangled and then cut in quarters before the populace.[9] Blackstone has referred to drawing and quartering, disemboweling, beheading, public dissection, burning at

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[6] *In re* Kemmler, 136 U.S. 436, 446-47 (1890).

[7] *Id.* at 447.

[8] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[9] 2 MICHEL DE MONTAIGNE, 112-13 (1913).

the stake, dismembering, and branding.[10] To define, as the United States Supreme Court seemed to do in the *Kemmler* and *Resweber* cases, "cruel and unusual" by a mere repudiation of the grosser aspects of torture and of the manifest cruelties of past centuries is to give a poor standard of measurement for contemporary society, to thwart and blunt the phrase and to destroy the protective purpose of our Eighth Amendment.

The advent of the dynamic and contemporary view of the meaning of "cruel and unusual punishment" first came in a 1910 case, *Weems v. United States.*[11] The United States Supreme Court decided that sentence of a defendant to a term of years coupled with the requirement that the defendant must carry a chain hanging from his ankle and wrist, and that he be employed at hard and painful labor and suffer permanent loss of civil rights, constituted the infliction of "cruel and unusual" punishment. Yet that sentence and punishment would have been considered mild in old England both before and after the enactment of the English Bill of Rights. Thus, the Supreme Court in the *Weems* case departed from the rule earlier stated in *Kemmler,* and instead held that the context of old England must not be allowed to determine the meaning of the words "cruel and unusual." Justice McKenna, speaking for the Court, stated that:

> Legislation . . . should not, therefore, be necessarily confined to the form that evil had there-

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[10]2 BLACKSTONE, COMMENTARIES 2620-23 (Jones' ed. 1916). These punishments were carried out after, as well as before, the English Bill of Rights was enacted, but Blackstone asserted that the post-1688 penalties were mild compared with the shocking apparatus of death and torment to be found in the criminal codes of many European countries at that time.

[11]217 U.S. 349 (1910).

tofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemoral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "Designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. . . .[12]

The *Weems* case did not condemn, nor has any case condemned in principle, the death penalty. It did, however, establish a primary concept that the definition of cruelty shall be fashioned in terms of the present and future needs of society, rather than the public's inclination, or standards regarding cruelty of medieval Europe.

In 1958 the dynamic view of *Weems* received express ratification when the Supreme Court cited that case with approval in its opinion in *Trop v. Dulles*.[13] In the latter case the Court held that excommunication and deprivation of citizenship, as a punishment for desertion, was "cruel and unusual" punishment, and thus, illegal. The Court recognized that "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the

[12] *Id.* at 369-73.

[13] 356 U.S. 86 (1958).

evolving standards of decency that mark the progress of a maturing society."[14]

Is the death penalty unconstitutional today within the context of the social and cultural conditions of this nation and of the world? The *Trop* and *Weems* cases hold that the concept of cruelty is a dynamic one. Necessarily, those holdings cause the constitutional question of the validity of capital punishment to be a combined question of law and fact. The facts to be adduced refer to the injuries done to society and to the family of the executed man, the extent of pain, both physical and psychological,[15] and generally the social context in such aspects as are relevant to the problem of crime, crime prevention, punishment and the developing culture and humanity of our country. The issue of constitutionality then requires the judges to be acute observers of the times and of the imperatives which spring from an "evolving standard of decency." If the death penalty is now repugnant to our evolved stand-

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[14] *Id.* at 99-101.

[15] A century-old passage from Dostoevsky's *The Idiot* gives a towering yet touching indication of the cruelty of capital punishment: "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute. . . . But in the other case (execution) all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible. . . ." DOSTOEVSKY, THE IDIOT 19-21 (1958).

ards "that mark the progress of a maturing society," then it seems that capital punishment ought to be struck down by judicial action.

III. THE TEST OF NECESSITY

Whether capital punishment and the processes and proceedings necessarily associated therewith violate the Eighth Amendment can be said to depend upon whether the processes are cruel by definition. Cruelty is properly definable as "the infliction of pain or loss without necessity[16] or justification."[17]

Blackstone considered necessity to be a prerequisite of the death penalty and noted that the necessity must be great and overriding:

> . . . But, indeed where capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity . . . of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes. . . .[18]

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[16]Cruelty: 1. Quality or state of being cruel, disposition to inflict or enjoy unnecessary pain or suffering; inhumanity. . . ." WEBSTER, NEW INTERNATIONAL DICTIONARY 636 (unabr. 2d ed., 1954).

[17]"Cruelty in the law, has no narrowly defined or technical meaning, but is a generic term applicable to all categories of wilful mistreatment, particularly the infliction of *unjustifiable* physical pain or suffering. . . ." 8 ENCYCLOPEDIA AMERICANA 254 (1956). (Emphasis added.)

[18]2 BLACKSTONE, COMMENTARIES 2164-65 (Jones' ed. 1916).

The courts have verged on, but have not expressly embraced the common sense definitions and doctrine that turns on necessity. In *Resweber,* though upholding the punishment, the majority admitted that: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . ."[19] The dissent in which Justices Burton, Douglas, Murphy and Rutledge joined, appeared to take a further step toward the literal application of the test of necessity: "Taking life by unnecessary cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily, until, today, some states have prohibited capital punishment altogether."[20]

At least as a philosophical criterion, unnecessary pain and loss in-the-method is not a far cry from unnecessary pain and loss in-the-prescription of punishment. Yet the writer has not been able to find any case where the facts have been placed before any court regarding the necessity for the death penalty itself. An issue of judicially noticeable fact looms as to the necessity or non-necessity for the institution of capital punishment in view of the alternative and available programs including, but not limited to, sentence of imprisonment for a term of years or for life. If there is no necessity for the death penalty, then the death penalty, under the definition stated above, becomes unconstitutional and cannot be imposed legally.

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[19]Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947). (Emphasis added.)

[20]*Id.* at 473.

The definition of cruelty as *unnecessary* pain or loss finds support in the comments of the early writers on republican government. Montesquieu, whose writings constitute to a great extent, part of the heritage of republican theory, commented:

> The severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or republic, whose spring is honor and virtue.
>
> In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes.
>
> Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them; let us follow nature, who has given shame to man for his scourage; and let the heaviest part of the punishment be in infamy attending it. . . .[21]

The wisdom of the common sense definition is attested not only by the use of the concept of necessity by the Supreme Court of the United States, albeit within a limited framework, but also by reference to ethical concepts. The ethics of republican government lead us to the conclusion that punishment shall not be meted which inflicts pain or loss without necessity. Jefferson and Locke extolled those who are "willing to part with only so much power as is *necessary* for their good government. . . ."[22]

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[21]4 MONTESQUIU, THE SPIRIT OF LAWS, book 6, ch. IX (1900).

[22]LONGMAN'S JEFFERSON PRESENTED BY JOHN DEWEY 54 (1948). (Emphasis added.)

From the standpoint of governmental morality, if we agree with Jefferson, we would deny to the governments such powers as are not necessary for a government to have. And the power to inflict the death penalty is qualitatively different and vastly greater today than any other punitive power in practice.

The critieria of necessity has also been supported as an ethical position by many eminent philosophers. For example, Albert Schweitzer believes that "to a man who is truly ethical all life is sacred, including that which from the human point of view seems lower in scale." In deciding when such life must be taken, Schweitzer would make distinctions only as each case arises, and under the pressure of *necessity.*[23]

As against life imprisonment, and other penological programs, is the death penalty necessary? If it is not, then under several tests, common sense, ethical and legal, the punishment of death constitutes cruelty.

IV. A PROPER FUNCTION FOR PUNISHMENT

Some recent decisions of our state courts suggest another criterion. Under this view capital punishment may be said to comprise unconstitutional cruelty if that institution cannot secure a proper function of society within civilized standards.

The California Supreme Court was called upon to decide whether, among other things, it had been improper for the trial judge to allow the jury to hear a certain tape recording. It seems the police had recorded the dying murder victim's pain, groans, and failing voice.

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[23]SCHWEITZER, OUT OF MY LIFE AND THOUGHTS 233 (1949).

The court, with Justices Schauer and McComb dissenting; reversed and remanded the case to the trial court. After holding that the evidence had no probative value other than showing the victim died in unusual pain, the court discussed the principle of criminal penalties:

> . . . Proof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted. . . . Pain unintentionally inflicted is relevant only to the extent that criminal penalties are designed to exact retribution for the evil done by criminals. Whatever may have been the facts historically, retribution is no longer considered the primary objective of the criminal law . . . and is thought by many not ever to be a proper consideration (see M. R. Cohen, *Law and the Social Order,* 310; Holmes, *The Common Law,* 42, 46; *Michael and Wechsler, Criminal Law and its Administration,* 10-11) granted, however, that retribution may be a proper consideration, it is doubtful that the penalty should be adjusted to the evil done without reference to the intent of the evildoer. Modern penology focuses on the criminal, not merely on the crime. . . .[24]

Three of the seven Justices of the California Supreme Court collaterally advanced the position indicated above in a subsequent case, *People v. Harmon,*[25] decided in April 1960. The defendant, a life prisoner, had attacked a fellow prisoner. At the time of the offense the California Penal Code[26] made the death penalty

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[24]People v. Love, 53 Cal. 2d 843, 856-57, 350 P.2d 705, 3 Cal. Rptr. 665 (1960).

[25]People v. Harmon, 54 Cal. 2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).

[26]CAL. PEN. CODE § 4500.

mandatory for the assault. Just before Harmon's trial, the Penal Code had been amended to make the death penalty optional. The Supreme Court of California had the task of deciding whether the amendment should be deemed retroactive to favor the defendant. The majority held that the death penalty remained mandatory as to the crime committed prior to the amendment. Chief Justice Gibson and Justice Traynor joined with Justice Peters in dissenting, concluding that the defendants should be given the benefit of the amendment:

> . . . There is no logical or rational reason to presume, as does the majority opinion, that the Legislature, in such cases intended the old law to apply. Such a presumption can only be predicated on the theory that *punishment is intended as vegeance against the wrongdoer. This violates all* the modern theories of penology.[27]

Recently, the New York Court of Appeals held that a defendant was entitled to the benefit of mitigated punishment and asserted that:

> This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward *one or more of three ends:* (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. *There is no place in the scheme for punish-*

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[27]People v. Harmon, 54 Cal. 2d 9, 32, 351 P.2d 329, 343, 4 Cal. Rptr. 161, 175 (1960) (Peters, J., dissenting).

ment for its own sake, the product simply of vengeance or retribution. (See Michael and Wechsler on *Criminal Law and its Administration* (1940), Pages 6-11; Note 55 Col. L.R., Pages 1039, 1052) . . .[28]

There is reason to believe that the above concept is potentially the majority rule of the California Supreme Court and of the United States Supreme Court. Can the death penalty be shown to have a proper function? Certainly its function cannot be that of rehabilitation, nor can it be that of confinement, a function which is thoroughly and efficiently served by imprisonment. The burden is to show that the death penalty constitutes, as compared to life imprisonment, and differentially, a deterrent upon future criminal activities. Unless the death penalty has such a proper function in our society, it would seem to be cruel by definition.

V. THE COMPARATIVE TEST

Another test, somewhat more mechanical, should be included in the contitutional review. If a penalty is more cruel than another punishment already held to violate these constitutional provisions, then the death penalty is unconstitutional as a matter of simple logic. Thus, comparison becomes the relevant factor.

In *Trop v. Dulles,* the Supreme Court held that a punishment generally considered *less* than death, the punishment of deprivation of citizenship, was neverthe-

[28]People v. Oliver, 1 N.Y.2d 152, 160, 134 N.E.2d 197, 201, 151 N.Y.S.2d 367, 373 (1956).

less "cruel and unusual" and violative of the Eighth Amendment:

> . . . There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. . . . In short, the expatriate has lost the right to have rights.
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. . . . The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . .[29]

If *Trop v. Dulles* is now the standard, does the death penalty constitute cruelty as a matter of law, based on comparison to the *Trop* case? And in considering the cruelty of the death penalty we must consider the antecedent and auxiliary processes as inflicted in California, the total experience of the courts and the executioner with respect thereto, and all the facts referable to pain, loss and torture. An issue of fact is tendered, even though the opinion suggests that the punishment attempted in the *Trop* case might be worse than death. The fact issue relates to the comparative pain and loss as between the death penalty with its antecedent waiting period following conviction, on the one hand, and the penalty in *Trop* on the other.

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[29]Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

VI. THE CONTEXT OF MAN'S DIGNITY

Repeatedly the courts advert to still another touchstone of cruelty. Under this test the question whether capital punishment violates the Eighth Amendment is to be answered affirmatively if the punishment violates conscience, morality, humanity, or the dignity of mankind.

In *Trop v. Dulles,* the Court stated: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this limit be exercised within the limits of civilized standards."[30]

A close reading of this decision,[31] and other opinions, particularly the dissenting opinions in the *Resweber* case,[32] leave a reader with a strong impression that a majority of the Justices of the United States Supreme Court disfavor capital punishment, and find it repugnant to their own respective consciences.[33]

The courts have announced that the measurement is to be made in terms of man's dignity. When the judges

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[30]*Id.* at 100.

[31]The majority opinion in *Trop,* in which Justices Black, Douglas and Whittaker joined with Chief Justice Warren, contains this gentle aside: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful . . ." *Id.* at 99.

[32]Justices Douglas, Murphy and Rutledge joined Justice Burton in referring to capital punishment as "cruelty" at least as it was there to be inflicted. Louisiana *ex rel.* Francis v. Resweber *supra* note 8, at 474 (dissent).

[33]Justice Frankfurter stated that: "A lifetime preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus I disbelieve in capital punishment. . . ." Haley v. Ohio, 332 U.S. 596, 602 (1948) (concurring opinion).

decide that judgment is to be made on the basis of a determination by the judges, applying their own knowledge, understanding, and historical and social perspective, then it seems capital punishment will be deemed illegal.

There is, as Montesquieu indicated in the eighteenth century, a reciprocal effect of crime and punishment.[34] It might be shown to the courts that historically, the more harsh and the more severe is the scale of punishment, the more degraded is the society as a correlative thereof. It further might be shown that the very act of the sovereign, descending in his majesty upon an offender to vengeful or unnecessarily severe punishment, a punishment that has been prepared by the sovereign with premeditation, coldness and infinite planning, has a symbolic effect upon society far beyond the fact that a life is then taken. This act by the state tends to cheapen the very values that refer to humanity itself, to lower the opinion of humanity regarding itself and to diminish its standards of decency, of conscience and of culture. The practice of capital punishment might be proven to violate the dignity of mankind.

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[34]Montesquieu pointed out that "experience shows that in countries remarkable for the lenity of their laws the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer penalties. . . . Mankind must not be governed with too much severity. . . . If there are other [countries] where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions." MONTESQUIEU, *op. cit. supra*, note 21, at ch. IX.,

VII. INTENT OF THE FRAMERS

Story has expressed the view that the provision against cruel and unusual punishment is unnecessary in a free government and was adopted only as an admonition to all departments to warn them against such violent proceedings as had taken place in England under the arbitrary reigns of some of the Stuarts.[35] The Supreme Court's opinion in the *Weems* case asserted that Story's citations[36] did not sustain the theory that the provision was intended to be so limited. The Court's opinion asserted that the framers of our Bill of Rights had something else in mind than merely to add verbiage to our Bill of Rights.

The framers were greatly influenced by the views of Blackstone and Montesquieu.[37] One can, with some force, urge that Montesquieu's and Blackstone's views regarding severity of punishment were shared by the framers and that it was their inclination to eliminate the practices summarized and condemned by Blackstone and ultimately the death penalty, when no longer necessary for the public safety.

The provision against cruel and unusual punishment received very little debate in Congress. According to the Congressional Record there were two primary objections to the adoption of this prohibition in the Eighth Amendment. Mr. Smith felt the phrase "cruel and unusual" was too indefinite. Mr. Livermore contended: "It is sometimes necessary to *hang a man*, vil-

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[35]2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1903).

[36]Weems v. United States, 217 U.S. 349, 368-73 (1910).

[37]1 BRYCE, THE AMERICAN COMMONWEALTH 274, 375 (1889).

lains often determine whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?"[38] In the *Weems* case, the Court based its reasoning and conclusion in part upon the fact that the Congress adopted the Eighth Amendment in the face of these objections and must be deemed to have intended to abolish certain cruelties.[39] However, Mr. Livermore also raised a point with regard to the death penalty. Can we not, therefore, conclude that the *Weems* decision is persuasive as to the emergent unconstitutionality of the death penalty?

If the "cruel and unusual" provision is interpreted in a strict manner, as Story suggested, the provision would be virtually a dead letter today. However, under the *Weems* view this prohibition is a vital provision of the Constitution and is available as a weapon to strike down cruelty in any form, and possibly in the form of capital punishment.

VIII. JUDICIAL SELF-RESTRAINT OR NULLIFICATION

The guarantee against cruel punishment is fundamental. The weapon of the Eighth Amendment is made to be wielded, and such wielding is the job of the judiciary. Thus, when the pertinent facts regarding the cruelty of the death penalty are complied and presented the judges ought to notice them; they should not be tabled as legislative matters.

Neither in *Weems* nor in *Trop*, where the United States Supreme Court had the burden to determine

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[38]CONG. REG. 225 (1910). This was referred to in Weems v. United States, 217 U.S. 349, 368-69 (1910).

[39]*Ibid.*

whether the Eighth Amendment was violated, did the Court deem the matter of cruelty to be merely a legislative and/or political question. Having found cruelty the Court struck down the punishments.

In *Trop* the Court pointed out that:

> In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an act of a national Legislature is challenged . . . . When the constitutionality of an act of Congress is challenged in this Court, we must apply those rules. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.[40]

In *Weems*, the Court applied the Eighth Amendment and a similar provision in the Philippine Bill of Rights to that island territory. The provision against "cruel and unusual punishment" was deemed "essential to the rule of law and the maintenance of individual freedom."[41] Since the Philippines were not incorporated at the time of the *Weems* case, only the most fundamental provisions of the American Bill of Rights applied.[42] Thus, is appears clear that the prohibition against cruel and unusual punishment was deemed by the Court in

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[40]Trop v. Dulles, 356 U.S. 86, 103 (1958).

[41]Weems v. United States, 217 U.S. 349, 367-68 (1910).

[42]Dorr v. United States, 195 U.S. 138 (1904) held that the Philippines were not incorporated into the United States, and that the constitutional right of trial by jury did not apply to judicial procedure in the Philippines. Subsequently, and six years after the *Weems* opinion, Congress provided that certain of these "non-fundamental" constitutional privileges be secured to persons in the Philippines, 39 Stat. 546 (1916), 48 U.S.C. § 1008 (1958).

the *Weems* case to be of a fundamental character, as compared, for example, to the less important guarantee of right to trial by jury.[43]

Although the legislature has the power to define crimes and their punishment and to determine the expediency of such laws, the Court has a legal duty to consider the law when it encounters a constitutional prohibition. The Court must then comprehend all that the legislature did or could take into account, considering the mischief and the remedy.[44]

A limited example of judicial consideration of the cruelty of a penalty as a question of fact is *Territory v. Ketchum,*[45] where the penalty of death was sustained in the New Mexico territory after a factual review, albeit superficial. In that case a statute imposed the death penalty upon any person who should make an assault upon any railroad train, for the purpose and with the intent to commit murder, robbery, or other felony upon passengers. The supreme court of the territory discussed the purpose of the Eighth Amendment, and rested its decision upon the conditions which existed in the territory, and the circumstances of terror and danger which accompanied the crime denounced. To take note, as in *Ketchum,* of the "conditions of the territory" is, in a sense, to receive evidence under the several tests suggested herein for testing the death penalty for cruelty. If in a subsequent case the evidence of the "condition of the territory" (state) and of the people, and relevant to the factual issues referable to the definitions of cruelty, establish that the death penalty is in fact cruel, then a court should strike down the penalty.

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[43]See note 42 *supra.*

[44]Weems v. United States, 217 U.S. 349, 378-79 (1910).

[45]Territory v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1910).

To ask a court to consider the cruelty of the death penalty as a question of fact is to ask the court to do what it is required to do by law. And if the death penalty is found to be unnecessary or unconscionable, and thus in fact cruel, the court must wield the Eighth Amendment to strike down this penalty.

IX. CONCLUSION

The term "cruel and unusual" is latently ambiguous to a profound extent. The cruelties and depravities of the middle ages and the Stuart period should to a degree be considered as a background for this constitutional prohibition. However, to exclusively consider past cruelties and fail to notice the present contents and standards perpetrates an anachronism. The phrase is a dynamic intendment and the courts must notice and consider the facts and resulting changed standards of decent conduct marked by our great penologists, wardens, social philosophers, and psychologists.

The same point, the need to consider changing standards, may be made as to the other suggested tests for determining the cruelty and, thus, unconstitutonality of the death penalty. What is necessary, under the test of necessity, changes with the changed knowledge, increased skills and improved facilities for incarceration, rehabilitation and for public education. Equally, necessity is to be judged by each era based on the scientific facts, such as factors of motivation and deterribility known to the judges of that era.

The ambiguity of the phrase "cruel and unusual" is latent and the latency resides in contemporary society and in the new facts which it harbors. To bring the artifacts and evidence of those facts to the court-

room is to fill out the dimensions of the question in the public law.

In terms of historical fact and tendency, the advances of man's liberty and of man's culture and civilization is accompanied by lessening of severity of punishment. It is also accompanied by an increasing appreciation and valuation of life itself.

The courts should seriously consider the changed and advanced standards of our civilization in determining if the death penalty is unconstitutional as cruel and unusual punishment.

APPENDIX B.

[VOL. 15, CRIME AND DELINQUENCY PAGE 1, JANUARY 1969]

Capital Punishment.*

Gerald H. Gottlieb

In simplest terms, the thesis of this paper is that the death penalty is torture, that it serves no other purpose than revenge, that revenge is an unconstitutional purpose, and that torture is an unconstitutional act. The supporting narrative relies upon historical and present facts and upon law. It offers a prediction that our courts will strike down the penalty, applying those facts to the Eighth Amendment of the Bill of Rights.

Departing from that narrative, I venture some personal expressions. To maintain an institution that sets a barbaric example is to thwart the civilizing process that holds man's only hope for survival. The death penalty is the most dramatic symbol of barbarism present in our national domestic life. It is not the only barbarism, yet to remove it is to sound a civilizing chord that will reverberate across the nation and its laws.

Raw punishment, in whatever form, is no answer to crime. The appropriate question is how to prevent and cure criminality—in those already miscreant, in those so inclined, and in those whose character is still unformed. The answer to the ques-

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tion must be relevant to the massive causes and subtle triggers of criminality.

* * *

Description of the larger tasks involved in the prevention and cure of criminality is beyond the scope of this paper and of any single investigator. It requires dialogue among all the pertinent disciplines and sciences. Its context is vast. The labors entail nothing less than the building of the Just Society.

The death penalty is but one of the obstacles now to be cleared away in order to permit construction of that edifice.

Revenge is no longer a proper objective of punishment. So say the highest courts of California and New York. The implications extend to the death penalty itself. This newly adopted philosophy, together with a realistic look at our Death Rows and a glance at our developing ethical structure, suggests that the courts may now be willing to *test* the constitutionality of the death penalty. The rule against "cruel and unusual" punishment, the U.S. Supreme Court said recently, applies as a fundamental guarantee not only to the federal government but also to the states. This indicates that capital punishment, if tested in the courts, might now be held illegal under the Bill of Rights, specifically in terms of the Eighth Amendment, which states that "cruel and unusual punishment" may not be inflicted.

In December 1965 the California Supreme Court declared in *In re Estrada* that punishment or treatment of criminal offenders should be directed toward one or more of three ends: (1) to discourage and act is a de-

terrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate him. "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." The court observed that these sentiments have generally been approved by legal writers and referred to a 1961 essay, "Testing the Death Penalty," in which I had proposed that the new philosophy of punishment would permit and ultimately require the courts to test capital punishment under the Eighth Amendment to the Constitution.

Of the three ends of punishment now acceptable to the California (and New York) courts, obviously death cannot rehabilitate. Obviously, also, confinement of the offender is accomplished by imprisonment. Does the death penalty act as a greater deterrent to crime than imprisonment?

The California Supreme Court, in another decision (*People v. Love,* 1960), noted: "There is . . . no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment." Three years later, the same court stated more emphatically in *People v. Ketchel:* "The sought imposition of the death penalty thus rests on the unproved and illegitimate assumption that it acts as a deterrence to the described 'potential killer.' . . . Indeed, no evidence supports the plethora of insinuation and implication of the deterrent of the death penalty implicit in the prosecution's argument."

The last link in the chain was supplied by the United States Supreme Court. *Robinson v. California,* in 1962, held that the command of the Eighth Amendment of the Constitution is embraced within the com-

mands of the due process clause of the Fourteenth Amendment and thereby applies to the states.

The facts indicate that the expanded meaning of the term "cruel," and the nature of capital punishment, put that penalty outside the pale of acceptable forms of punishment. Viewed against the decisions quoted here, the facts permit no justification for the maintenance of Death Rows. As far as I know, no courts in the country have yet been presented with the facts relating to the death penalty and to society's developing standard of what is to be deemed "cruelty." It is fair to conclude, I believe, that in due course the courts will no longer permit states to inflict the death penalty.

I.

The Meaning of Cruelty.

It is the law that "cruelty" is to be defined not in terms of the excesses existing when the term was inserted in the Bill of Rights, but rather in terms of the contemporaneous condition of society. As early as 1910 the U.S. Supreme Court declared in *Weems v. United States:* "Legislation . . . should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." This dynamic view received express ratification in 1958, in *Trop v. Dulles,* when the Supreme Court said: "The words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . The basic

concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

Merely to assert that death is the ultimate cruelty and therefore must be unconstitutional is to recite a tautology. It is appropriate to go to the facts to gather whatever may indicate the present standards that "mark the progress of a maturing society."

Society applies its standards in many pursuits. We may detect changes in the standard of decency between the seventeenth, eighteenth centuries and the present era by looking at various domestic activities of Western society. Comparison of how it has treated its offspring, its seamen, its accused persons, its working females, its cripples, its pupils, its industrial and agricultural workers, its insane persons, etc., in earlier times and in the present shows an explosive expansion of the concept of cruelty.

Children were once subject to the same criminal jurisdiction as adults. Mixed almshouses and indenture provided most of the care for dependent children for the fifty years preceding 1875. The cotton factories established in the country districts of Lancashire and Yorkshire toward the close of the eighteenth century were worked largely by children from London and other towns, brought to the country in cartloads and housed in overcrowded and unsanitary dormitories. Corporal punishment of the insane and feeble-minded was the common practice. Insanity was looked upon as mere perversity. It was believed that severe flogging could produce fear and thus enforce discipline.

Throughout the Middle Ages, cripples occupied the status of mendicants and children were mutilated to make them valuable as beggars. It was not until 1634 that St. Vincent de Paul established the first haven for their protection—one of the first institutions for child care. Institutions for the care and education of crippled children were first established in Munich in 1823, in Paris in 1853, and in New York in 1863. (In the United States the first state to provide for crippled children at public expense was Minnesota—as late as 1897.)

Massachusetts, the most industrialized of the American states, was the pioneer in labor legislation, but it was 1836 before it enacted the first statute providing schooling for employed children. In 1842 it passed a ten-hour work law for children under twelve years of age. In 1876-1877 it broke new ground when it enacted a ten-hour law for women, a law requiring the employment of factory inspectors, and a law on industrial safety.

In the United States, after the abolition of slavery, peonage became a penalty for vagrancy and petty crimes, especially when committed by Negroes. It became customary in many areas to impose a fine and to accept payment of it from an employer of labor who then secured the services of the culprit until the amount of the fine had been worked out. A system of long-continued, if not permanent, involuntary servitude developed, and it was not until 1910 that the Supreme Court ruled state laws under which peonage had been tolerated to be unconstitutional.

The "packet rats" of the Atlantic sailing ships of the early nineteenth century were often made into desperate

characters by the "bucko mates" who kicked and bullied them into submission and not infrequently maimed or murdered them. In certain medieval codes actual dismemberment was countenanced as a punishment for specified offenses. Flogging persisted well into the nineteenth century. Today, corporal punishment is prohibited and elaborate regulations provide for the safety of vessel and crew and for the sanitary conditions of food and living quarters.

Thus, in the domestic affairs of society an expansion of the definition of "cruelty" has clearly occurred. We cannot, of course, put it to a quantitative yardstick of measurement. If we could, I suggest that although we have far to go before attaining a truly humane society, the expansion would be found to have raised our standard of decency and humanity in domestic life many times over what it was in earlier centuries.

If society today, through its courts, should apply the same standard to its criminals as it does in its other pursuits, might it not sweep away the Death Rows, the gas chambers, the death wait, and the death penalty itself?

II.

The Death Penalty vs. Other Extreme Penalties.

Dostoevsky wrote *The Idiot* with the experience behind him of having faced a firing squad right up to the moment of execution. He described the feeling of approaching execution in this way: "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and

that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute . . . but in the other case [execution] all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible. . . ."

Albert Camus also equated the death penalty with the most extreme forms of punishment. He was unable to see anything in capital punishment but a "penalty the imagination could not endure." In "Reflections on the Guillotine" he shared Arthur Koestler's conviction: the death penalty "besmirches our society, and its upholders cannot reasonably defend it. . . ." He held it to be the most premeditated of murders, to which no criminal's deed, however calculated it might be, could be compared. The only equivalent would be a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment, had confined the victim for months. "Such a monster," wrote Camus, "is not encountered in private life."

Describing the anguish of the condemned, Camus wrote: "He hopes by day and despairs of it by night. As the weeks pass, hope and despair increase and become equally unbearable. According to all accounts, the

color of the skin changes, fear acting like an acid. . . . What criminal ever reduced his victim to such a desperate and powerless condition?"

Camus believed that this oscillation process, over time, is the cause of the odd submissiveness that is customary in the condemned at the moment of their execution. These men who have nothing more to lose could try to run away and thus die of a chance bullet or engage in the kind of frantic struggle that dulls all the faculties and be guillotined feeling less. In a way, Camus said, this would amount to dying freely. And yet, with few exceptions, the condemned walk toward death passively in a sort of dreary despondency. He sums up by noting an absurdity: "As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he killed but once. Compared to such torture, the penalty of retaliation seems like a civilized law. It never claimed that the man who gouged out one of his brother's eyes should be totally blinded."

There is strong indication that the death penalty was associated in the eighteenth century and earlier with punishments considered to be torture. In 1750 Blackstone wrote in his *Commentaries on the Laws of England*: "Of these [punishments] some are capital, which extend to the life of the offender, and consists generally in being hanged by the neck until dead, though in very atrocious crimes other circumstances of terror,

pain, or disgrace are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. . . . Some punishments consist in exile or banishment. . . . Some, though rarely, occasion a mutilation or dismembering, by cutting off the hands or ears. . . ."

We no longer cut off ears, but we still kill. The explosion in the meaning of cruelty between that early era and now has not yet brought the courts to declare the death penalty unconstitutional. This can mean that the courts await the presentation of facts; or that the injunction aganst cruelty is to be taken seriously by society in all pursuits *except* punishment; or that Camus and Dostoevsky and all the other writers then and now are wrong, and death is not, with its antecedent—waiting—the practical equivalent of other tortures and extreme penalties.

This essay proceeds from the first proposition. The second proposition is contradicted by the fact that the *only* place in our Constitution where the term "cruelty" is used is in relation to its prohibition regarding punishment. The third proposition flies in the face of the human experience of men honored for their ability to observe and transmit in words the reality of that experience.

III.

The Significance of Concealment.

Public knowledge of the realities of execution today is remote, for the people are protected by prison walls and a semantic veil. The symbols but not the substance reach them. It is of the greatest significance, I suggest, that executions are carried out away from the public eye and that the public spectacle of hangings and beheadings has been left behind to earlier centuries. This is evidence that if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of "cruelty," particularly when we contrast this present custom of secrecy with the one-time public display of executions.

Boswell tells us of the eighteenth century attitude in his "The Hypochondriac LXVIII" in the *London Magazine:* "When I first attended executions, I was shocked to the greatest degree. I was in a manner convulsed with pity and terror, and for several days, but especially nights after, I was in a very dismal situation. Still, however, I persisted in attending them, and by degrees my sensibility abated; so that I can now see one with great composure, and my mind is not afterward haunted with frightful thoughts: though for awhile a certain degree of gloom remains upon it. I can account for this curiosity in a philosophical manner, when I consider that death is the most awesome object before every man. . . ."

In the next century Charles Dickens, in a letter to the London *Times*, described the wickedness of the crowd and the absence of restraint or pity, and in a letter to the *Daily News* in 1846 he noted the interaction between public execution and the public's valuation of life: "I have stated my belief that the study of such scenes leads to the disregard of human life, and to murder. Referring since that expression of opinion to the very last trial for murder in London, I have made inquiry and am assured that the youth now under sentence of death in Newgate for the murder of his master . . . was a vigilant spectator of the three last public executions in this City. . . . In reference to this very question of Capital Punishment, Robespierre himself, before he was 'in blood steeped in so far,' warned the National Assembly that in taking human life, and in displaying before the eyes of the people scenes of cruelty and the bodies of murdered men, the law awakened ferocious prejudicies, which gave birth to a long and growing train of their own kind."

A few years earlier, in 1840, William Makepeace Thackeray wrote "Going to See a Man Hanged" and observed: "Many young dandies are there with moustaches and cigars; some quiet, fat family-parties of simple, honest tradesmen and their wives, as we fancy, who are looking on with the greatest imaginable calmness, and sipping their tea."

Thackeray continues: "I must confess . . . that the sight has left on my mind an extraordinary feeling of terror and shame. It seems to me that I have been abetting an act of frightful wickedness and violence, performed by a set of men against one of their fellows; and I pray God that it may soon be out of the power of

any man in England to witness such a hideous and degrading sight. Forty thousand persons (say the Sheriffs), of all ranks and degree—mechanics, gentlemen, pickpockets, members of both Houses of Parliament, streetwalkers, newspaper-writers, gather together before Newgate at a very early hour; the most part of them give up their natural quiet night's rest, in order to partake of this hideous debauchery, which is more exciting than sleep, or than wine, or the last new ballet, or any other amusement they can have. Pickpocket and Peer each is tickled by the slight alike, and has that hidden lust after blood which influences our race.

". . . I fully confess that I came away from Snow Hill that morning with a disgust for murder, but it was for the murder I saw done."

Henry Fielding, writing a century earlier, considered that the punishment of the condemned person would be increased and intensified if his execution were to be made private: "If executions . . . were so contrived that few could be present at them, they would be much more shocking and terrible to the crowd without doors than at present, as well as much more dreadful to the criminals themselves, who would thus die in the presence mainly of their enemies. . . . Nothing can, I think, he imagined (not even torture, whic I am an enemy to the very thought of admitting) more terrible than such an execution; and I leave it to any man to resolve himself upon reflection, whether such a day at the Old Bailey or a holiday at Tyburn would make the strongest impression on the minds of everyone."

William Curtis Bok, who was a justice of the Pennsylvania Supreme Court, stated in *Star Wormwood:* "It

is strange how people talk about deterrence and the death penalty. Great publicity is given to war and its horrors under pious captions that knowledge of its horror may deter the race from future war. But no publicity is given to executions, though the argument for deterrence is the same. Why not show executions in motion pictures, television, stage, and press, so that all may see, if they have such magnificent deterring power? Why is the state so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?"

The act of hiding an evil from the conscience permits the inference that the conscience has been assaulted by the very evil from which it retreats.

IV.

Behind the Walls.

The judges are, after all, the final protectors, without which no Bill of Rights would be worth the writing. Courts may not abdicate those duties. The task is to bring the realities of "cruel punishment" to the individual judges, fact by fact, and human being by human being. Let us look at some descriptions of scenes on "the Row" at San Quentin Prison as recorded by a warden, a chaplain, and a doctor of medicine who attended the inmates for several years.

In *88 Men and 2 Women* Warden Clinton T. Duffy describes the first execution after he took over his job—that of George Costello. Three days before his scheduled execution Costello slashed his throat with a razor blade. This necessitated a postponement. Dr. W. P. Goddard wrote the warden that "while Costello would probably be able to mount the scaffold on schedule, the

wound would open when he dropped, considerable hemorrhaging would result, and the doctor could not guarantee that the head wouldn't be completely severed." The Governor granted a reprieve for the sole purpose of giving him time to recover sufficiently for an execution that would not be too messy."

Some of Duffy's subjects marred the quietness of the "perfect execution": the condemned do not always die gracefully. He describes a prisoner named Northcott at a period before Duffy became warden and was Warden Holohan's secretary. Northcott claimed to have taken poison but, as it proved, he was just "scared to death":

". . . 'Must I see it all?' Northcott asked. 'Can't I have a blindfold?' The warden, his face ashen, nodded, and a black cloth was wrapped around the boy's eyes. His hands shook so much that it took two guards to hold them in position long enough to be strapped together.

"He was utterly petrified. . . .

"Behind me, I heard him sob, 'Please—don't make me walk too fast.' I didn't have to turn around to know that the guards were dragging him. He was almost limp when they reached the foot of the gallows. As he was carried up the thirteen steps, he let out a succession of hoarse cries which increased in intensity until the big room sounded like a madhouse."

Former Row Chaplin, Byron E. Eshelman, wrote in *Death Row Chaplain* of the execution of Robert Pierce, who was about twenty-four at the time of his arrest for the murder of a cab-driver. (The robbery had netted him about seven dollars.) Pierce had spent three years on the Row and made no secret of the fact that he

planned to "die hard." The day before his "last elevator ride," Pierce kicked the toilet loose from his cell wall. He was placed in isolation.

The next morning, the chaplain approached Pierce's cell. The condemned man was covering his face with his hands, then looked up and grinned.

"Blood was pulsing from his neck," wrote Chaplain Eshelman.

A medical officer and a lieutenant of the guards hurred into the cell and Pierce tried to fight them off.

"They pinioned his arms, discovered a four-inch gash across the right side of his throat, all the way up to the ear."

The warden ordered four guards to drag Pierce from the holding cell and carry him into the gas chamber. He fought all the way down the corridor, screaming, "Lord . . . You know I'm innocent."

Blood sprayed from his neck as he was carried inside the gas chamber.

" 'I'm innocent,' he screamed at the witnesses. 'Don't let me go like this. Oh, God!'

"Two witnesses got sick and had to leave."

Leandress Riley, too, had aroused concern that he would die "badly." When the final hour arrived, a guard unlocked his cell. Riley gripped the bars with both hands and began a long bone-chilling, wordless cry. The guards pulled him from the bars and stripped off his shirt and trousers. His flailing arms and legs were forced into a white shirt and blue denims.

The deep-throated cry continued, alternating with moaning and shrieking. Riley was carried to the gas

chamber, fighting and writhing all the way. Using all their strength, the guards held him while the doctor taped the ends of the stethoscope in place.

The tension aroused in a condemned man awaiting the approach of the fatal hour is intolerable; often he chooses suicide as a solution to the anxiety and despair. A year after Pierce's execution, Eshelman writes, Oscar Burst, condemned for killing his wife and sixteen-year-old stepson, cut his throat with a piece of mirror the day before he was to go downstairs. Ralph Rogers, known as "little Navajo," jammed the lock of his cell with cloth, tied his mattress ticking to the ventilator grill, twisted the other end around his neck, and hanged himself by stepping off the toilt seat. Boyd Van Winkle awaited his execution in the prison hospital. Each night he was given a sleeping pill. He "tongued" his pills until he had saved a lethal dose, then took them all one night. He never recovered from his coma.

Others, unable to stand the waiting, go insane. In *The San Quentin Story,* Warden Duffy discusses the case of Edwin Walker: "I shook Walker gently and spoke to him. He shrank from my touch and stared at me, but there was no recognition in his eyes. He seemed to be in a state of profound shock; his lips moved but made no sound.

". . . The next morning, with the official witnesses waiting outside the gas chamber and the executioner standing by, seven consulting physchiatrists crowded into the little death cell to look at a broken shell of a man. Walker was mumbling to himself, crawling like a whipped dog on the floor, and hiding his head under a blanket. At intervals he burst into tears, and jumped wildly at the slightest touch. The doctors were unable

to make him talk, and at 10 a.m., the hour set for Walker's death, they signed a statement declaring he had gone insane. . . ."

For the condemned who can survive anxiety and despair while awaiting his hour without attempting suicide or going completely out of his mind, there is a final involuntary humiliation. Again and again, those about to be executed experience a loss of control of the sphincter muscles and find, to their horror, that they have soiled themselves. A natural relaxation of these muscles is a result of death; but for it to occur in advance of it can only be explained by the presence of uncontrollable and inordinate fear.

Dr. William F. Graves, during his period of service as a medical officer at San Quentin, made some fifty visits on the Row, examining each condemned inmate to determine his physical and mental status and to recommend any treatment that might be needed. In an interview he told me that at the end of this service he was left with the clear conclusion that, although the professional and custodial staff of the institution exert every reasonable and honest effort to make Death Row tolerable both to its inmates and to the staff, its grim mechanics turn it into a form of punishment as cruel as any man has yet devised.

Death Row is a shock, he said, for nearly all of the inmates placed there. For those with a potential for growth and rehabilitation, the shock may actually cause the inmate to think seriously for the first time in his life, to learn to read and write, to understand the world about him better. In these cases, the cruelty of Death Row and of capital punishment lies more in the fact that we are then executing not the original criminal but

a redeemed man. In more cases, however, the shock of Death Row results in accelerating the process of mental deterioration.

Dr. Graves cited the case of Henry Ford McCracken, a man whose tiny head caused Graves to regard him as a probable microcephalic: "During his stay on Death Row, McCracken became no more than a vegetable. On one occasion I found him wallowing on the floor of his cell in his own excreta babbling incoherently. I arranged to have him transferred to the prison hospital where he was given electric shock therapy—this to bring him to a point of sanity at which he might be considered able to understand that he was being punished at the time of his execution."

Graves commented that others intelligent enough to understand their fate fought furiously, both mentally and emotionally, against it: "I remember Gilliam. When I saw him first, seated at the rear of his cell hunched over his small table with great beads of sweat literally pouring from his face onto the open Bible he was studying, I was accompanied by a prison official who handed him a court document. . . . He took the document. The attendant attempted to console him. This was quite fruitless. He returned to his Bible to literally sweat out the remaining days before the date scheduled for his execution. As I recall it, he did eventually receive a brief stay, only some weeks later to again go through a similar period of agony in expectation of the State's taking his life on an appointed day at an appointed hour."

Our society is based on a belief in the inherent dignity of man. Surely anything which undermines that dignity must be viewed as abhorrent to it. There is no need to relate more of these morbid vignettes.

V.

The Innocents.

There is yet a further victim of the ritual: the family of the condemned. In discussing the case of Edwin Walker, Warden Duffy wrote: "Eventually the courts turned down all Walker's appeals, and his father, crushed by the costly and futile fight for his son's life, committed suicide." Regarding the Louise Peete case: "Richard Peete [her husband] . . . suffered agonies while she was on trial for . . . murder, couldn't stand the shock of her sentence and committed suicide. . . . The records also revealed that a Dallas hotel clerk who had been friendly with Louise was found dead one day with a bullet in his head, an apparent suicide."

Sing Sing Warden Lewis E. Lawes wrote in *Life and Death in Sing Sing* that capital punishment is a punishment that falls most severely on the family of the defendant; the murderers' torment eventually ends but the wives, the mothers, the children, continue to suffer after the executions. "I yield to no one," Lawes said, "in acknowledging the duty we owe to the family of the murderer's victim, but I have very grave doubt whether society is right in inflicting this terrible burden on the innocent family of the murderer, believing, as I do, that the punishment serves no purpose other than to get rid of the murderer."

Victor Hugo wrote in *The Last Days of the Condemned:* "The alternatives are these: first, the man you destroy is without family, relations, or friends in the world. In this case, he has received neither education nor instruction; no care has been bestowed either on his mind or heart; then, by what right would you kill this

miserable orphan? You punish him because his infancy trailed on the ground, without stem, or support: you make him pay the penalty of the isolated position in which you left him! you make a crime of his misfortune. No one taught him to know what he was doing; this man lived in ignorance: the fault was in his destiny, not himself. You destroy one who is innocent.

"Or, secondly;—the man has a family; and then do you think the fatal stroke wounds him alone?—that his father, his mother, or his children will not suffer by it? In killing him, you vitually injure all his family: and thus again you punish the innocent.

"Blind and ill-directed penalty; . . . on whatever side it turns, [it] strikes the innocent!"

VI.

The Test of Necessity.

Cruelty is properly definable as "the infliction of pain or loss without necessity or justification." Blackstone considered necessity to be a prerequisite of the death penalty and noted that the necessity must be great and overriding: ". . . But, indeed were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity . . . of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes. . . ."

The courts have verged on, but have not expressly embraced, the common-sense definitions and doctrine that turn on necessity. In the *Resweber* case in 1947, though upholding the punishment, the Supreme Court majority admitted that: "The traditional humanity of modern Anglo-American law forbids the inflicting of unnecessary pain in the execution of the death sentence. . . ." The dissenting opinion contained this statement: "Taking life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily, until, today, some states have prohibited capital punishment altogether."

Unnecessary pain and loss in-the-method is not a far cry from unnecessary pain and loss in-the-prescription of punishment. Yet there has been no case where the facts have been placed before any court regarding the *necessity* for the death penalty. If there is no necessity for it, then, under the definition stated above, it becomes unconstitutional and cannot be imposed legally.

The definition of cruelty as *unnecessary* pain or loss finds support in the comments of the early writers on republican government. Montesquieu commented: "The severity of punishment is fitter for despotic governments, whose principal is terror, than for a monarchy or republic, whose spring is honor and virtue. In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes. Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has

given us to conduct them; let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be in infamy attending it. . . ."

VII.

Our Changing Standards.

The world trend today is toward abolition of capital punishment. In the United States, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have all abolished it by law. A few other states—New York, North Dakota, Rhode Island, and Vermont—retain it for a second-time murderer or for the slaying of a police officer or for murder by a lifer. During the past two decades, lack of use of the death penalty has virtually abolished capital punishment in many states in which the law still allows it. From the peak year of 1935 when 199 persons were executed, the number of executions has been dramatically reduced: 1962, thirty-seven; 1963, twenty-one; 1964, fifteen; 1965, seven; 1966, one.[1]

On the national level federal penal institutions maintain no means for carrying out the death sentence; state facilities are used whenever necessary. But only one federal prisoner has been executed since 1957. In the armed forces, the last execution in the Army took place on April 13, 1961, the last execution in the Navy was on December 1, 1842.

Deputy Attorney General Ramsey Clark,[2] in a speech in July, 1965, gave the views of the Department of

[1]In 1967 there were two executions; in 1968, through Dec. 1, none.—Ed.

[2]Appointed attorney general in February 1967.—Ed.

Justice on capital punishment: "We favor the abolition of the death penalty. Modern penology with all its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime."

In *88 Men* Warden Duffy was of the same opinion: "I hate the death penalty because it is not the deterrent to crime that its advocates claim. . . . I have yet to meet the man who let the thought of the gas chamber stop him from committing murder."

Similarly, Boris Pasternak wrote in *Doctor Zhivago:* "If the beast who sleeps in man could be held down by threats—any kind of threat, whether of jail or retribution after death—then the highest emblem of humanity would be the lion tamer in the circus with his whip, not the Prophet who sacrificed himself."

The facts of death are not matters of geography. A statement by the Ceylon Commission of Enquiry on Capital Punishment (1959) included the following: "It is . . . our view that the statistics of homicide in Ceylon . . . tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that . . . reintroduction [of capital punishment] cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative of protracted imprisonment."

In a lecture, Dr. Karl A. Menninger argued that the commission of terrible acts is not deterred by terrible

threats of retaliation. Sexual atrocities, for example, are caused by mental disturbance and many such cases can be corrected. "Meanwhile," Menninger added, "our duty as people is to work until we can correct the disturbances, and not take lives or dose out terrible punishments with the thought that by doing so we can deter future crimes."

If the death penalty were to be put on trial metaphorically and charged with being unconstitutionally cruel, testimony by the legion of wretches who have suffered it and by those who have written against it might well open the proceedings. They would testify that the death penalty assails the dignity of man, is inhuman, and violates all standards of decency. Tolstoy would say, "Only to the extent to which people renounce violence and establish their relationships on rational considerations, will there be a real future for the life of mankind." Shelley would say: "The first law which it becomes a Reformer to propose and support, at the approach of a period of great political change, is the abolition of the punishment of death. . . . It is sufficiently clear that revenge, retaliation, atonement, expiation, are rules and motives so far from deserving a place in any enlightened system of political life that they are the chief sources of a prodigious class of miseries in the domestic circles of society." The continuing victim is mankind.

Of the acceptable purposes of punishment, the proponents of the death penalty cannot prove its power to deter. When comparisons are made between adjoining states of the United States with similar populations and similar social, economic, and political conditions—some of them lacking and other retaining capital punish-

ment—homicide rates are the same and have followed the same trend over a long period of time. The rate of policemen killed by criminals, for example, is no higher in abolitionist states than in comparable death-penalty states. Moreover, when *all* of the states are separated into abolitionist and executionist states and each group is averaged, the homicide rate in the executionist states is far higher.

The British World Commission, after making an exhaustive examination of capital punishment, concluded: "Whether the death penalty is used or not, both death penalty and abolitionist States show homicide rates which suggest that these rates are conditioned by other factors than the death penalty. . . . The general conclusion which we have reached is that there is no clear evidence in any of the figures that we have examined that the abolition of capital punishment has led to an increase in the homicide rate or that its reintroduction had led to a fall."

VIII.

Conclusion.

Against such facts and opinions we lay the difficult yardstick of the law: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that his power be exercised within the limits of civilized standards." (*Trop v. Dulles*).

The Eighth Amendment was required by the people as one of those fundamental rights essential to the government which it was then forming. The Amendment imposes a limit upon the power of government. We as a people share with Jefferson a jealousy of powers ar-

rogated or unnecessarily retained by the State, and it seems clear that maintenance of the death penalty involves government in the use of power beyond that permitted by our Bill of Rights.

It might be shown to the courts that, historically, the more harsh and the more severe the scale of punishment, the more degraded is the society as a correlative thereof. It further might be shown that the very act of the sovereign, descending in his majesty upon an offender to give vengeful or unnecessarily severe punishment, a punishment that has been prepared with premeditation, coldness, and careful planning, has a symbolic effect upon society far beyond the fact that a life is then taken. The act by the State tends to cheapen the values that refer to humanity itself, to lower the opinion of humanity regarding itself, and to diminish its standards of decency and conscience.

The pertinent facts regarding the death penalty should be presented and tested in the courts. The ambiguity of the phrase "cruel and unusual" is latent, and the latency resides in contemporary society and in the new facts that it harbors. To bring the artifacts and evidence of those facts to the courtroom is to fill out the dimensions of the question in the public law. In terms of historical fact and tendency, the advance of man's liberty and of man's culture and civilization is accompanied by a lessening of the severity of punishment. It is also accompanied by an increasing appreciation and valuation of life itself. Unless the burden of justification for the inflicting of the penalty can be supported, the judges, wielding the blade of the Eighth Amendment, should strike it down as unconstitutional.

* * *

[POSTSCRIPT]

The point might be raised that another provision of the Bill of Rights to our Constitution seems to contradict the application of the Eighth Amendment to capital punishment. This counter-argument is that the command against cruel punishment in the Eighth Amendment is contravened by the fact that the taking of life is mentioned in the Fifth Amendment.

The Fifth Amendment says: "A person shall not be deprived of life, liberty or property without due process of law." One might argue that this provision necessarily provides that life, as well as liberty or property, *may* be taken as punishment for at least some crimes.

In initial response to this counter-argument, four things beyond what is in my paper should be noted:

First: Immediately preceding the above-quoted clause, the Fifth Amendment states, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." If we take the counter-argument seriously, this language of the Fifth Amendment should also imply that limb may be taken as punishment for at least some crimes.

"Limb" as a noun means a leg or arm of a human being; as a verb it means "to dismember, to cut or tear off the limbs of." The taking of limb is torture already held cruel and therefore unconstitutional.

The counter-argument, if followed to its logical conclusion, would revert us to the practices described by Blackstone.

Second: When the first Congress of the United States came to draft the Eighth Amendment, it was reminded that the words "cruel and unusual punish-

ment" might some day prohibit capital punishment. Mr. Livermore, speaking on the proposed prohibition against "cruel and unusual" punishments, addressed the members: "It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? The first Congress noted the remarks and, even so, went on to propose the Eighth Amendment.

Third: The counter-argument says, in effect, that because taking of life is mentioned in the Fifth Amendment, along with taking of liberty and of property, the Eighth Amendment cannot make illegal all life-taking nor all liberty-taking, nor all property-taking. If, then, we merely urged that the Eighth Amendment prohibits the killing of offenders under twenty-one, or the killing of offenders in states that have good prison systems which provide sufficient alternative punishment, or the taking of the lives of first offenders as compared with recidivists, the argument falls. In other words, the argument at most says that some vestige of the life-taking power of the State must be left to it in order to recognize the force of the Fifth Amendment.

Fourth: The Eighth Amendment vastly differs from the Fifth in its treatment of the subject of kinds of punishment. The Eighth confronts the subject head-on in clear proscription: ". . . nor shall cruel and unusual punishments be inflicted." The Fifth Amendment does not *confront* capital punishment. It merely notes the subject in the course of stating a series of injunctions against (a) holding to answer unless on a presentment or indictment; (b) subjecting a person to

be twice put in jeopardy for the same offense; and (c) depriving a person without due process of law.

The evils attacked in the Fifth Amendment, in other words, are the evils of prosecution without safeguards. The evil attacked in the Eighth Amendment is the evil of punishments that may be cruel. Mr. Justice Marshall stated: "We must never forget that it is a *constitution* we are expounding." Professor Paul Freund has said that "in its most enduring and memorable decisions, the Court has been careful not to read the provisions of the Constitution like a Last Will and Testament lest, indeed, they become one."

SUPREME COURT OF THE UNITED STATES

No. 642.—October Term, 1968.

Edward Boykin, Jr., Petitioner, v. State of Alabama. | On Writ of Certiorari to the Supreme Court of Alabama.

[June 2, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

In the Spring of 1966, within the period of a fortnight, a series of armed robberies occurred in Mobile, Alabama. The victims, in each case, were local shopkeepers open at night who were forced by a gunman to hand over money. While robbing one grocery store, the assailant fired his gun once, sending a bullet through a door into the ceiling. A few days earlier in a drugstore, the robber had allowed his gun to discharge in such a way that the bullet, on ricochet from the floor, struck a customer in the leg. Shortly thereafter, a local grand jury indicted petitioner, a 27-year-old Negro, on five counts of common-law robbery—an offense punishable in Alabama by death.

Before the matter came to trial, the court determined that petitioner was indigent and appointed counsel [1] to represent him. Three days later, at his arraignment, petitioner pleaded guilty to all five indictments. So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court.

Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it.

Alabama provides that when a defendant pleads guilty, "the Court must cause the punishment to be determined

[1] *Hamilton* v. *Alabama*, 368 U. S. 52; Ala. Code 1958, as amended, Tit. 15, § 318 (1–12) (Supp. 1967).

by a jury" (except where it is required to be fixed by the court) and may "cause witnesses to be examined to ascertain the character of the offense." Ala. Code 1958, Tit. 15, § 277. In the present case a trial of that dimension was held, the prosecution presenting its case largely through eyewitness testimony. Although counsel for petitioner engaged in cursory cross-examination, petitioner neither testified himself nor presented testimony concerning his character and background. There was nothing to indicate that he had a prior criminal record.

In instructing the jury, the judge stressed that petitioner had pleaded guilty to five counts of robbery,[2] defined as "the felonious taking of money . . . from another against his will . . . by violence or by putting him in fear . . . [carrying] from ten years minimum in the penitentiary to the supreme penalty of death by electrocution." The jury, upon deliberation, found petitioner guilty and sentenced him severally to die on each of the five indictments.

Taking an automatic appeal to the Alabama Supreme Court, petitioner argued that a sentence of death for common-law robbery was cruel and unusual punishment within the meaning of the Federal Constitution, a suggestion which that court unanimously rejected. 281 Ala. 659, 207 S. 2d 412. On their own motion, however, four of the seven judges discussed the constitutionality of the process by which the trial judge had accepted petitioner's guilty plea. From the order affirming the trial court, three judges dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty. The fourth member concurred separately, conceding that "a trial judge should not accept a guilty plea unless he was determined that such a plea was

[2] The elements of robbery, in Alabama, are derived from the common law, but the possible penalties are fixed by statute. Ala. Code, Tit. 14, § 415 (1958).

voluntarily and knowingly entered by the defendant," but refusing "for aught appearing . . . to presume that the trial judge failed to do his duty." 281 Ala. 662–663, 207 So. 2d, at 414–415. We granted certiorari. 393 U. S. 820.

Respondent does not suggest that we lack jurisdiction to review the voluntary character of petitioner's guilty plea because he failed to raise that federal question below and the state court failed to pass upon it.[3] But the question was raised on oral argument and we conclude that it is properly presented. The very Alabama statute (Ala. Code Tit. 15, § 382 (10) (1958)) that provides automatic appeal in capital cases also requires the reviewing court to comb the record for "any error prejudicial to the appellant, even though not called to our attention in brief of counsel." *Lee* v. *State*, 265 Ala. 623, 630, 93 So. 2d 757, 763 (1957). The automatic appeal statute "is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review." *Douglas* v. *State*, 42 Ala. App. 314, n. 6, 331, n. 6, 163 So. 2d 477, 494 (1963). In the words of the Alabama Supreme Court:

> "Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, we may consider any testimony that was seriously prejudicial to the rights of the appellant and may reverse thereon, even though no lawful objection or exception was made thereto. [Citations omitted.] Our review is not limited to the matters brought to our attention in brief of counsel." *Duncan* v. *State*, 278 Ala. 145, 157, 176 So. 2d 840, 851.

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[3] This is unlike *Cardinale* v. *Louisiana*, 394 U. S. —, in which the state court was perhaps unacquainted with the federal question at issue. For, as already stated, four of the seven judges on the court below (a majority) discussed the matter and its implications for Alabama law.

It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See *Kercheval* v. *United States*, 274 U. S. 220, 223. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." *Jackson* v. *Denno*, 378 U. S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley* v. *Cochran*, 369 U. S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction.[4] Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of un-

[4] "A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced . . . . It supplies both evidence and verdict, ending the controversy." *Woodard* v. *State*, 42 Ala. App. 552, 558, 171 So. 2d 462, 469.

constitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas* v. *Alabama*, 380 U. S. 415, 422.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U. S. 1. Second is the right to trial by jury. *Duncan* v. *Louisiana*, 391 U. S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas*, 380 U. S. 400. We cannot presume a waiver of these three important federal rights from a silent record.[5]

What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any

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[5] In the federal regime we have Rule 11 of the Federal Rules of Criminal Procedure which governs the duty of the trial judge before accepting a guilty plea. See *McCarthy* v. *United States*, 394 U. S. —. We said in that case:

"A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.*, at —.

review that may be later sought.[6] (*Garner* v. *Louisiana*, 368 U. S. 157, 173; *Specht* v. *Patterson*, 386 U. S. 605, 610), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.[7]

The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error "because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." 281 Ala., at 663, 207 So. 2d, at 415.

Reversed.

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[6] Among the States requiring that an effective waiver of the right to plead not guilty appear affirmatively in the record are Colorado, Colo. Rev. Stat. Ann., § 39-7-8; Illinois, Ill. Stat. Ann. c. 38, §§ 113-114 (1964); Missouri, *State* v. *Blaylock*, — Mo. —, 394 S. W. 2d 364 (1965); New York, *People* v. *Seaton*, 19 N. Y. 2d 406, 407, 280 N. Y. S. 2d 370, 371 (1967); Wisconsin, *State* v. *Burke*, 22 Wis. 2d 486, 494, 126 N. W. 2d 91, 96 (1964); and Washington, *Woods* v. *Rhay*, 68 Wash. 2d 601, 605, 414 P. 2d 601, 604 (1966).

[7] "A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, *inter alia*, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences." *Commonwealth ex rel. West* v. *Rundle*, 428 Pa. 102, 105-106, 237 A. 2d 196, 197-198 (1967).

SUPREME COURT OF THE UNITED STATES

No. 642.—October Term, 1968.

Edward Boykin, Jr., Petitioner, v. State of Alabama. | On Writ of Certiorari to the Supreme Court of Alabama.

[June 2, 1969.]

Mr. Justice Harlan, whom Mr. Justice Black joins, dissenting.

The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because "the record [is] inadequate to show that petitioner . . . intelligently and knowingly pleaded guilty." *Ante*, at 2. The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure. It does so in circumstances where the Court itself has only very recently held application of Rule 11 to be unnecessary in the federal courts. See *Halliday* v. *United States*, 394 U. S. — (1969). Moreover, the Court does all this at the behest of a petitioner who has never at any time alleged that his guilty plea was involuntary or made without knowledge of the consequences. I cannot possibly subscribe to so bizarre a result.

I.

In June 1966, an Alabama grand jury returned five indictments against petitioner Boykin, on five separate charges of common-law robbery. He was determined to be indigent, and on July 11 an attorney was appointed to represent him. Petitioner was arraigned three days later. At that time, in open court and in the presence of his

attorney, petitioner pleaded guilty to all five indictments. The record does not show what inquiries were made by the arraigning judge to confirm that the plea was made voluntarily and knowingly.[1]

Petitioner was not sentenced immediately after the acceptance of his plea. Instead, pursuant to an Alabama statute, the court ordered that "witnesses be examined, to ascertain the character of the offense," in the presence of a jury which would then fix petitioner's sentence. See 14 Ala. Code § 415 (1940); 15 *id.*, § 277. That proceeding occurred some two months after petitioner pleaded guilty. During that period, petitioner made no attempt to withdraw his plea. Petitioner was present in court with his attorney when the witnesses were examined. Petitioner heard the judge state the elements of common-law robbery; heard him announce that petitioner had pleaded guilty to that offense and might be sentenced to death. Again, petitioner made no effort to withdraw his plea.

On his appeal to the Alabama Supreme Court, petitioner did not claim that his guilty plea was made involuntarily or without full knowledge of the consequences. In fact, petitioner raised no questions at all concerning the plea.[2] In his petition and brief in this Court, and in oral argument by counsel, petitioner has never asserted that the plea was coerced or made in ignorance of the consequences.

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[1] The record states only that:

"This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment on these cases charging him with the offense of Robbery and plead guilty." Joint Appendix 4.

[2] However, I am willing to accept the majority's view that we do have jurisdiction to consider the question.

II.

Against this background, the Court holds that the Due Process Clause of the Fourteenth Amendment requires the outright reversal of petitioner's conviction. This result is wholly unprecedented. There are past holdings of this Court to the effect that a federal habeas corpus petitioner who makes sufficiently credible allegations that his state guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. See, *e. g.*, *Waley* v. *Johnston*, 316 U. S. 101 (1942); cf. *Machibroda* v. *United States*, 368 U. S. 487 (1962). These holdings suggest that if equally convincing allegations were made in a petition for certiorari on direct review, the petitioner might in some circumstances be entitled to have a judgment of affirmance vacated and the case remanded for a state hearing on voluntariness. Compare *Jackson* v. *Denno*, 378 U. S. 368, 393–394 (1964). However, as has been noted, this petitioner makes no allegations of actual involuntariness.

The Court's reversal is therefore predicated entirely upon the failure of the arraigning state judge to make an "adequate" record. In holding that this is a ground for reversal, the Court quotes copiously from *McCarthy* v. *United States*, 394 U. S. — (1969), in which we held earlier this Term that when a *federal* district judge fails to comply in every respect with the procedure for accepting a guilty plea which is prescribed in Rule 11 of the Federal Rules of Criminal Procedure, the plea must be set aside and the defendant permitted to replead, regardless of lower-court findings that the plea was in fact voluntary. What the Court omits to mention is that in *McCarthy* we stated that our decision was based "solely upon our construction of Rule 11," and

explicitly disavowed any reliance upon the Constitution. *Id.*, at —. Thus *McCarthy* can provide no support whatever for today's constitutional edict.

III.

So far as one can make out from the Court's opinion, what is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process. If this is the basis upon which Boykin's conviction is being reversed, then the Court's disposition is plainly out of keeping with a sequel case to *McCarthy*, decided only last month. For the Court held in *Halliday* v. *United States*, 394 U. S. — (1969), that "in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively." *Id.*, at —. The Court quite evidently found Halliday's conviction to be "constitutionally valid." For it affirmed the conviction even though Halliday's guilty plea was accepted in 1954 without any explicit inquiry into whether it was knowingly and understandingly made, as now required by present Rule 11. In justification, the Court noted that two lower courts had found in collateral proceedings that the plea was voluntary. The Court declared that:

> "[A] defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack the plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy* he is not without a remedy to correct constitutional defects in his conviction." 394 U. S., at —.

It seems elementary that the Fifth Amendment due process to which petitioner Halliday was entitled must

be at least as demanding as the Fourteenth Amendment process due petitioner Boykin. Yet petitioner Halliday's federal conviction has been affirmed as "constitutionally valid," despite the omission of any judicial inquiry of record at the time of his plea, because he initiated collateral proceedings which revealed that the plea was actually voluntary. Petitioner Boykin, on the other hand, today has his Alabama conviction reversed because of exactly the same omission, even though he too "may . . . resort to appropriate post-conviction remedies to attack the plea's voluntariness" and thus "is not without a remedy to correct constitutional defects in his conviction." In short, I find it utterly impossible to square today's holding with what the Court has so recently done.

I would hold that petitioner Boykin is not entitled to outright reversal of his conviction simply because of the "inadequacy" of the record pertaining to his guilty plea. Further, I would not vacate the judgment below and remand for a state-court hearing on voluntariness. For even if it is assumed for the sake of argument that petitioner would be entitled to such a hearing if he had alleged that the plea was involuntary, a matter which I find it unnecessary to decide, the fact is that he has never made any such claim. Hence, I consider that petitioner's present arguments relating to his guilty plea entitle him to no federal relief.[3]

[3] Petitioner advances two additional constitutional arguments: that imposition of the death penalty for common-law robbery is "cruel and unusual punishment" in violation of the Fourteenth Amendment; and that to permit a jury to inflict the death penalty without any "standards" to guide its discretion amounts to a denial of due process. I do not reach these issues because the Court has not done so.